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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 538

HERMAN L. R. EMMET, JR., On Behalf of Himself and all Others Similarly Situated, *Petitioners*

v.

SUMNER G. WHITTIER, Administrator of Veterans Affairs, et al., *Respondents*

JAMES A. DEERING, On Behalf of Himself and all Others Similarly Situated, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

ROBERT H. MABBUTT, et al., Suing for Themselves and all Persons Similarly Situated, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN GLEVER TAUSIG
NATHANIEL F. BEDFORD
LAWRENCE A. SCHEI
Attorneys for Petitioners

BUTLER, KOEHLER & TAUSIG
1629 Investment Building
Washington 5, D. C.

DILLON, BEDFORD & HOPPEN
68 William Street
New York 5, New York

WHITE, HARBER, FORT & SCHEI
923 Twelfth Street
Sacramento 14, California
Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners on behalf of themselves and all others similarly situated pray that a writ of certiorari issue to review the judgment of the United States Court of

Appeals for the District of Columbia Circuit, which set aside judgments of the United States District Court for the District of Columbia awarding several thousand veterans the relief sought in these actions.

OPINIONS BELOW

The opinion of the District Court in these cases, which were consolidated for trial, is not reported; it is set forth on pages 142 through 145 of the appendix record, nine copies of which have been filed with this Court.

The opinion of the Court of Appeals covering the consolidated cases is reported in — U.S. App. D.C. —, 281 F. 2d 24, and is printed as Appendix A, *infra*.

JURISDICTION

The judgment of the Court of Appeals is dated June 23, 1960, and was entered on that date. (Appendix B, *infra*.).

On September 16, 1960 the Court of Appeals issued an order denying appellees' timely filed Petition for Rehearing en Banc.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and 2101(c).

QUESTIONS PRESENTED

A. Jurisdiction in *Deering* and *Mabbutt*.

1. Is jurisdiction conferred by the National Service Life Insurance Act (38 U.S.C. 784) to decide an action against the United States brought by an insured to obtain payment of a dividend duly declared and payable under his contract of National Service Life Insurance, when claim is made for such dividend and payment

of such dividend is refused by reason of assertion of an offset based on an alleged indebtedness of the insured to the United States?

2. Is jurisdiction to be determined by the allegations of the complaint, or by the "true dispute" as revealed by the answer? More specifically, if jurisdiction is conferred in the circumstances set forth in Question A. 1, may the United States by admitting liability to the insured for the dividend and asserting an offset based on an alleged indebtedness of the insured to the United States, not related to National Service Life Insurance, defeat the jurisdiction which lay under the complaint?

B. Jurisdiction in *Emmet*.

1. Does an action for mandamus lie under the equity powers of the federal courts to compel the Administrator of Veterans Affairs and other responsible Government officials to account for and pay over duly declared National Service Life Insurance dividends and duly awarded disability compensation, when:

(a) As payment thereof became due the Administrator, acting in the name of the United States, offset against them an alleged but non-existent indebtedness of the veterans to whom such dividends and compensation were payable; and

(b) The claim of indebtedness was based upon a demonstrably erroneous construction of the Soldiers' and Sailors' Civil Relief Act of 1940; or

(c) Such offset was specifically prohibited by statute.

2. If an action for mandamus will lie in the circumstances set forth in Question B. 1, do the equity powers

of the federal courts give the trial judge jurisdiction to issue a writ of mandamus directing the Administrator of Veterans Affairs to apportion among the veterans benefited and to deduct from the amounts payable to them, reasonable attorneys' fees for the prosecution of the several legal actions which resulted in the payments from which the deductions are to be made?

3. If it be shown that the National Service Life Insurance Act imposes a ministerial duty upon the Administrator of Veterans Affairs to pay interest on declared special dividends when such dividends are not paid when due, but instead are converted to the use of the United States (see Question C. 1), may payment of such interest be compelled by mandamus?

C. Interest.

1. When the United States, the trustee of the National Service Life Insurance (Trust) Fund, misappropriates to its own use special dividends payable out of that Fund, does the National Service Life Insurance Act (38 U.S.C. 701-724) provide for the payment of interest on the monies so misappropriated?

2. If the veterans to whom such dividends were payable were legally entitled to interest thereon during the period of misappropriation, did Congress intend to destroy that right by providing in Public Law 85-586, 72 Stat. 487, 50 App. U.S.C. 540 n, for the repayment of the misappropriated funds "without interest"? If Congress so intended and if P.L. 85-586 be so construed, was there a taking without compensation of the veterans' property rights contrary to the Fifth Amendment of the Constitution of the United States?

D. Class Actions.

1. Do class actions come within subdivision (2) or subdivision (3) of Rule 23 (a) of the Federal Rules of Civil Procedure when:

(a) Such actions are brought to recover monies wrongfully converted to the use of the United States by offsets against dividends payable to several thousand veterans out of monies in the National Service Life Insurance (Trust) Fund and against disability compensation payable to many of them, which offsets were based on alleged indebtedness under the Soldiers' and Sailors' Civil Relief Act of 1940; and

(b) At all material times there were appropriations with which the Administrator of Veterans Affairs was obligated to restore to said trust fund the monies which had been wrongfully taken therefrom; and

(c) The aforementioned offset collections, as well as other collections based on alleged indebtedness under the Soldiers' and Sailors' Civil Relief Act of 1940, were deposited in the Soldiers' and Sailors' Civil Relief Revolving Fund; and

(d) At all material times there were sufficient monies in said Revolving Fund to repay those veterans from whom disability compensation and other gratuitous benefits had been wrongfully collected; and

(e) At all material times there were appropriations with which the Administrator of Veterans Affairs was obligated to pay duly awarded disability compensation; and

(f) By Public Law 85-586 Congress restored to said Revolving Fund sufficient monies to pay *all* veterans

from whom such collections had been made and directed the Administrator to repay them?

2. When adequate representation of all similarly situated persons has been insured, what effect did the class actions described in the preceding questions have on the rights of members of the class who have not intervened therein?

Specifically:

(a) Have the applicable statutes of limitation been tolled for absent members of the class represented in such actions?

(b) Must the absent members intervene before trial to be entitled to participate in such relief as is granted by judgment therein?

(c) If the answer to the preceding question (D. 2 (b)) is "No", must such absent members intervene before entry of the trial court's judgment or before the judgment becomes final to be entitled to participate in such relief as is granted?

(d) Are the absent members entitled to participate in the relief granted by the final judgment therein if they do not intervene at any time during the proceedings, and will a judgment therein be *res judicata* as to them?

E. Litigation Costs and Attorneys' Fees.

1. When litigation consisting of a test case coupled with class actions has created or preserved the funds listed in Question D. 1, *supra*, and the trial judge in the class actions, exercising his discretion for what he considers to be dominating reasons of justice, apportions the costs of such litigation among the parties appearing therein and others who will receive payment from

such funds, is such apportionment a valid exercise of the equity powers of the federal courts as to:

(a) members of the class whose legal rights in and to such funds were preserved by such litigation and whose right to receive payment from such funds was established by judgments obtained therein;

(b) other persons who had unenforceable claims in and to such funds, but who received repayment of amounts collected from them under mistake of law, when such repayments were made through legislation which would not have been enacted but for the aforementioned litigation, and the legislation provided for payment of the unenforceable claims "to assure equal treatment of all those concerned in this matter"?

STATUTES, RULES AND REGULATIONS INVOLVED

The pertinent text of the statutes, rules and regulations involved are set forth in Appendix C to this petition. Their citations are as follows:

1. The National Service Life Insurance Act, 72 Stat. 1148-1157, 38 U.S.C. 701-724, and related insurance provisions of Chapters 3, 19 and 53 of Title 38 U.S.C., particularly sections 211 (formerly 2211), 702 (formerly 802 (e)), 707 (formerly 802 (f)), 719 (formerly 804), 720 (formerly 805), 784 (a) (formerly 445 and 817), 784 (g) (formerly 551), 784 (h) (formerly 445), 785 (formerly 808 and 2211 (a)) and 3101 (b) (formerly 454 a)), and 38 U.S.C. (1952 Ed.) 808, 54 Stat. 1012 and 60 Stat. 788.

2. Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 56 Stat. 775, 50 App. U.S.C. Article IV, (1951 ed.), particularly section 546.

3. Act of June 26, 1934, 48 Stat. 1233, c. 756, sec. 20, as amended, 31 U.S.C. 725 s (c) (1).

4. Act of September 2, 1958, 72 Stat. 1115, 38 U.S.C. 211 (formerly 2211). See 38 U.S.C. 211 above.

5. Public Law 85-586, 72 Stat. 487, 50 App. U.S.C. 540 n. Printed from 50 App. U.S.C. 540 note.

6. Public Law 36, 82nd Cong., 65 Stat. 43, 38 U.S.C. 707 (formerly 802 (f)). See 38 U.S.C. 707 above.

7. Public Law 45 c. 121, 82nd Cong., 1st Sess., 65 Stat.

8. Public Law 759 c. 896, 81st Cong., 2nd Sess., 64 Stat.

9. War Risk Insurance Act of October 6, 1917, 40 Stat. 398, Article I, c. 105, sec. 20.

10. World War Veterans Act of 1924, 43 Stat. 612, c. 302, sec. 17.

11. Veterans Administration Regulations 3426, 38 C.F.R. 8.26; 3426 A, 38 C.F.R. 8.26 a.

12. Federal Rules of Civil Procedure Rule 23 a (2) and (3), Rule 52 (a).

STATEMENT OF THE CASE

These three class actions arise out of the same factual background involved in *United States* v. *Plesha*, 352 U.S. 202, decided January 13, 1957. *Plesha* was not a class suit. Although requested by Plesha's attorney to do so, counsel for the Government refused to stipulate that the final decision in *Plesha* would govern the claims of several thousand veterans in exactly the same situation as Plesha, and stated that the Government would plead the statutes of limitation against any of

them who did not file timely suit (R. 68, 90, 95). Therefore, it was necessary to commence these class actions before *Plesha* was decided by the Supreme Court, in order to protect such veterans from the bar of limitations.

These cases raise three important issues which were raised in the lower courts in Plesha's litigation but not decided by this Court. They also involve several important issues not raised in that litigation.

In *Plesha* this Court held that ex-soldiers had no obligation to repay premiums on commercial insurance which the Government had paid on their behalf under the provisions of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1183, 50 U.S.C. App. (1940 ed.) 540. The basis of the holding was that the servicemen involved "had no statutory or contractual obligation to the Government to repay the premiums * * * because the language of the 1940 Act, its legislative history and its administrative interpretation *demonstrate*[1] that Congress intended that ex-soldiers would not have to reimburse the Government." 352 U.S. at 204. Therefore, the Court affirmed the judgment in *Plesha* v. *United States*, 227 F. 2d 624 (C.A. 9) which provided for recovery of a dividend declared on Plesha's National Service Life Insurance policy, against which the Administrator of Veterans Affairs had offset the amount the Government had paid on his commercial insurance when he allowed it to lapse. But this Court was not called on to decide whether the National Service Life Insurance Act conferred jurisdiction in the case, whether Plesha was

[1] All emphasis throughout this petition is supplied by petitioners' attorneys.

entitled to interest on the dividend not paid, and whether the Government was prohibited by statute from offsetting against N.S.L.I. benefits its claim for reimbursement under Article IV of the Civil Relief Act of 1940.

A similar suit was commenced by Hormel in the Southern District of New York in November, 1950, in which Stilson intervened. That suit was a class action. The district court found for the named plaintiffs. *Hormel v. United States*, 123 F. Supp. 806. After the decision, Hormel moved for an order "directing that appropriate steps be taken to notify all other persons similarly situated to the plaintiff to intervene in this action". The motion was denied. 17 F.R.D. 303. An appeal by the Government from the decision for plaintiffs was held in abeyance pending the final determination of *Plesha*, after which judgment was entered (R. 152), but not until these class actions had been commenced.

Plesha was represented by Lawrence A. Schei of Sacramento, California; Hormel by Nathaniel F. Bedford of New York City; these two attorneys coordinated their efforts beginning in 1951 and in 1954 the law firm of Butler, Koehler and Tausig of Washington, D.C., was brought in to assist (Tr. 183, R. 151-153).

The Administrator of Veterans Affairs, in addition to collecting from several thousand veterans in exactly the same situation as Plesha, some $962,048.83 by offset against their 1948 special National Service Life Insurance dividends payable in 1950 out of the National Service Life Insurance (Trust) Fund, collected $64,292.23 by offset against disability compensation and other veterans' benefits, $24,177.20 by offset against subsistence allowances and other payments due from

the Government and by suit, and $592,547.52 by way of "voluntary" payments made after demand by the Government. The total of all of these collections was $1,643,065.78. Some 8,440 veterans were and are involved (R. 111-14, 147).

All of the monies so collected were deposited in the Soldiers' and Sailors' Civil Relief Revolving Fund pursuant to the Act of April 3, 1948 (62 Stat. 160) where they were available for the payment of obligations of the Government to the insurance companies. (R. 73-74, 83, 114, 147). Throughout the entire period from 1950 to October 20, 1958, that Fund was "with the Treasury Department" but the withdrawals therefrom were under the exclusive control of the Administrator of Veterans Affairs. (R. 113-115). The money in this Fund was not "in the Treasury", but "out of the Treasury" (S. Report No. 1862, 85th Cong., 2nd Sess., p. 11) and was subject to withdrawal by the Administrator, as well as by Act of Congress. Pursuant to the Act of March 28, 1953 (67 Stat. 16) and the Act of June 24, 1954 (68 Stat. 292) $1,500,000 was taken from the Revolving Fund and placed in the surplus of the Treasury (R. 74, 130, 147-148).

Shortly before the six year statutes of limitation (38 U.S.C. 784 and 28 U.S.C. 2401) would have run the *Emmet* class action was commenced on December 30, 1955, in the District of Columbia, the *Deering* class action was commenced on December 20, 1955, in the Southern District of New York and the *Robert Mabbatt* class action was commenced on January 13, 1956, in the Northern District of California.

Jurisdiction in *Deering* was grounded on the provisions of 38 U.S.C. 817 and 445 (now 38 U.S.C. 784), 28

U.S.C. 1346(a)(2) and 1402(a) and Rule 23, F.R.C.P. (R. 167). Jurisdiction in *Mabbatt* was grounded on the provisions of 38 U.S.C. 801-818 (now 38 U.S.C. 501-524 and 784) and 28 U.S.C. 1346 (R. 185). In *Emmet* the court of first instance had federal jurisdiction under the general equity powers of the federal courts, 5 U.S.C. 1009, 38 U.S.C. (1952 ed.) 808, and Rule 23 F.R.C.P. (R. 7).

Deering and *Mabbatt* sought to compel the United States to pay the dividends withheld, with interest. *Deering* also prayed that all concerned be notified so that they could intervene or otherwise protect their rights (R. 167-172; 184-188).

Emmet sought by writ of mandamus to compel the Administrator of Veterans Affairs, the Secretary of the Treasury, the Treasurer of the United States and the Comptroller-General to perform their ministerial duties by making payment of the dividends and disability benefits due, to account for the funds withheld, and to make known the names and addresses of all similarly situated persons so that they could be informed of their rights. The Court was also asked to impress a trust on the funds collected and deposited in the Soldiers' and Sailors' Civil Relief Revolving Fund (R. 7-14). Van Valkenburgh and Moses intervened in *Emmet* seeking similar relief (R. 14-24).

The plaintiffs in *Plesha* (except Kern) and the plaintiffs in *Mabbatt* intervened in *Emmet* in November, 1956, and the plaintiffs in *Hormel* and *Deering* intervened in *Emmet* in December, 1956. Their petitions in intervention prayed for the same relief as did *Emmet*, and in addition asked that interest be awarded on monies deducted from National Service Life In-

surance dividends, and that any funds held by the defendants which might be impressed with a trust as prayed for be charged with the attorneys' fees and costs of plaintiffs and intervenors (R. 31-38; 39-46).

On the merits and upon jurisdictional grounds the answers to the complaint and petitions in intervention denied the right of the veterans to recover. Most of the answers were filed *after* this Court's decision in *Plesha* (R. 24, 27, 29, 47, 50, 53, 56, 59, 62, 65). On August 1, 1957 plaintiff and intervenors moved for summary judgment (R. 47). While that motion was under advisement, defendants amended their answers to allege as a defense that the Administrator was seeking a legislative appropriation for funds necessary to pay all veterans the principal sums collectgl by setoff or otherwise (R. 4, 78). The motion for summary judgment was denied (R. 80).

The appropriation to which the amended answer referred had been presented to the Subcommittee on Independent Offices Appropriations of the House Committee on Appropriations. On July 30, 1957, the Subcommittee decided that since legislation was also involved, the matter should be submitted to the appropriate legislative committee (R. 126-135). Congress adjourned without taking further action. When Congress reconvened the House Committee on Veterans Affairs had before it a letter from the Comptroller General to the Attorney General in which it is stated:

> "The Assistant Attorney General, Civil Division, calls attention to the case of *Emmet* v. *Higley, et al,* [now *Emmet* v. *Whittier, et al*] (Civil Action No. 5658-55) pending in the United States District Court for the District of Columbia, a mandamus proceeding to compel payment into court of

> the amounts withheld from veterans on account of the purported indebtedness. He states that the purpose of that action in which numerous veterans have intervened is to recover costs, interest, and attorney's fees, that the complexion of the case daily becomes more serious in view of the increasing impatience of the courts to anything that might be considered administrative hair-splitting which prevents substantial justice being done and because fully a year has gone by without the Government's compliance with the Plesha decision of the Supreme Court." (R. 116; S. Rept., No. 1862, 85th Cong., 2d Sess., p. 8).[2]

The Committee also had before it a letter from the Comptroller-General to the Chairman of the Committee on Veterans Affairs, House of Representatives, which stated:

> "We therefore recommend favorable consideration of the bill and wish to suggest that its prompt passage would obviate the necessity for the filing of suits by the veterans and, where no technical defenses are available, the almost certain entering of judgments against the United States with additional expense both to the veteran and the United States." (S. Rept. No. 1862, 85th Cong., 2d Sess., p. 7).

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[2] This legislative history and that set forth below are important, because they are a partial basis for the trial court's finding that "but for the professional services rendered in the Plesha and Hormel cases and in the three consolidated actions presently before this Court, the Veterans Administration would not have sought legislation . . . to refund any of the monies collected . . . from the 8440 veterans . . . H.R. 9369 would not have been enacted into law . . . and those of the 8440 . . . from whom collections were made by demand, by set-off against other benefits and by suit, would not have had such monies restored to them". It was for this reason that the trial court apportioned the costs of such litigation among those veterans as well as the veterans represented in these actions. (R. 159, 160).

Without holding public hearings the Committee on Veterans Affairs considered H.R. 9369 in executive session and on March 11, 1958 reported the Bill favorably (Cong. Rec. Vol. 104, p. 4040). In so doing, the Committee stated:

> "The net result of the enactment of the bill is to provide for expeditious administrative payment of what might be regarded as a windfall for the 8,440 potential claimants indicated in the report of the Veteran's Administration. However, any delay can only mean further litigation on this subject and since the principle has already been decided by the Supreme Court, no matter how long the delay the ultimate result would be payment . . ." (H. Rept. No. 1491, 85th Cong., 2d Sess., p. 2).

During the period the legislation was under consideration petitioners' attorneys sought amendments to the bill (H.R. 9369) proposed by the Administrator. The proposed amendments would have made it clear that the interest question was left for determination by the court in this litigation, would have eliminated the requirement that application for refund be made within two years, and would have provided for withholding 10% of the monies to be repaid pending determination by the court of the question of allowing the litigants their litigation costs and attorneys' fees (R. 141-142). Later, a fourth amendment was proposed by petitioners' attorneys which would have required notice to each veteran of his rights under the statute (R. 115). All of these proposals were opposed by the Government and none of them was embodied in the bill, but the Report of the Senate Committee (No. 1862, 85th Cong. 2d Sess.) stated that individual notice was expected to be given to each potential claimant or his heirs or legal representatives (R. 115-116).

The legislation eventually enacted on August 1, 1958 (P.L. 85-586; 72 Stat. 487) in some respects went beyond the relief sought in these class actions. For example, it provided for repayment of voluntary payments and amounts collected by suit. However, it required that application for refund be made within two years; so that as to any person who through lack of notice or inadvertence failed to make application by August 1, 1960, these suits are his only hope of recovery.[3] It did not provide for interest on the monies misappropriated from the National Service Life Insurance (Trust) Fund, although the Government had had the use of these trust funds for over eight years. It did not make any provision for attorneys' fees or costs.

In the meantime, after denial of plaintiffs' motion for summary judgment in *Emmet*, and while Congress was considering H.R. 9369, *Deering* and *Mabbatt* were transferred, over defendant's objection, from the Southern District of New York and the Northern District of California, respectively, to the District Court of the District of Columbia (R. 176, 195). Prior to the enactment of the legislation these cases were consolidated with *Emmet* for trial (R. 81).

Immediately after August 1, 1958 plaintiffs in the consolidated cases moved for a court order: (1) restraining the Administrator from requiring the waiver of interest as a condition of payment under P.L. 85-586; and (2) restraining the Administrator from distributing more than 90% of the payments authorized by

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[3] Upon inquiry we were orally informed by David A. Turner, Associate General Counsel for Legal Services, Veterans Administration, that according to report of July 9, 1960 approximately 1,500 of the 8,440 veterans involved had not made application for the refunds authorized by P.L. 85-586, as of about June 30, 1960.

P.L. 85-586 (R. 84-87). The motion to restrain waiver of interest was denied on the strength of representation by counsel for the Government that the Administrator did not intend to require the waiver (R. 87-88), inasmuch as:

> "We do not contend that enactment of Public Law 85-586 deprives the Court of jurisdiction, if any it may have, to adjudicate the claim of interest . . . This being true, the Act leaves the matter of interest in *status quo*, which is all plaintiffs can ask. It is thus certain that plaintiffs have suffered no irreparable injury on account of the enactment of this legislation insofar as their claim for interest is concerned . . ." (Original record, Vol. 2, C.A. 5658-55).

The Court enjoined the Administrator from disbursing more than 90% of the payments authorized by P.L. 85-586, such injunction to remain in effect until the final determination of this litigation or until further order of the Court. The Court also required the attorneys personally to post a $3,000 bond to indemnify the Government for additional costs resulting from the order, if it should ultimately be reversed (R. 89-94). The injunction and bond are still in effect.

Trial was had in October, 1958, at the conclusion of which the District Court ruled (R. 142-145): That the defendants' challenges to jurisdiction were without merit; that mandamus was available for the relief sought in *Emmet*; that the three actions were "hybrid" class actions within Rule 23 (a) (2) of the Federal Rules of Civil Procedure; that the collections by the Administrator were wrongful, unlawful and beyond his statutory power and authority and constituted a misappropriation of funds belonging to the veterans in-

volved; that under these circumstances the National Service Life Insurance Act provides for the payment of interest at 3% per annum on the misappropriated dividends; that the skilled and effective services of plaintiffs' attorneys produced, preserved and restored to the several thousand servicemen represented, whose property they are, the funds to be returned to them; and that these attorneys were entitled to an award or compensation from all of the 8,440 veterans involved by reason of the benefits they derived from the services rendered. The Court found that a fee of 5% (an average of about $10 per veteran) would be fair and reasonable in the circumstances. It ordered that litigation expenses were to be deducted first from the 5% award, and the balance applied to attorneys' fees.

Findings and conclusions were prepared and signed (R. 146-161) and judgment was entered on November 7, 1958. (R. 162-165). Defendants appealed. The Court of Appeals reversed, finding the District Court to have been without jurisdiction, disallowing interest, and refusing to charge the veterans' recovery with litigation costs or attorneys' fees.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

A. Jurisdiction in *Deering* and *Mabbutt*.

1. The jurisdictional prerequisites for a suit founded upon the National Service Life Insurance Act are "disagreement" as to "a claim for insurance benefits". 38 U.S.C. 784. The Court of Appeals held that these jurisdictional requirements were not met in the *Deering* and *Mabbutt* suits, stating that the declared N.S.L.I. dividend sought to be recovered therein is *not* an "insurance benefit" within the meaning of the Act. In so holding the Court of Appeals followed the con-

struction placed on the Act by *Candell* v. *United States*, 189 F. 2d 442, 444 (C.A. 10), which construction had been considered and rejected in *Plesha*, *Deering*, and *Mabbutt* by five district court judges in three circuits. *Candell* held that an "insurance benefit" is "money or its equivalent paid as indemnity for a loss insured against" and thus limits suits under the Act to those seeking recovery of death or disability or endowment benefits, the only losses insured against.

The Court of Appeals' construction of the Act decides an important question of federal law which has not been—but should be—settled by this Court. The question is important because it affects substantial rights of "about 16,000,000 veterans who took out insurance [N.S.L.I.] during World War II" (R. 122), and the same rights of all who have purchased such insurance since 1945. If the Court of Appeals' decision is permitted to stand, these millions of veterans and members of the armed services will no longer have the right, prior to the time that monies are payable under the policy by reason of death, disability or reaching the endowment age, to obtain judicial review of the decisions of the Administrator of Veterans Affairs when there is "disagreement" as to a claim concerning: (1) dividends; (2) entitlement to interest on monies held for the insured in the National Service Life Insurance Fund; (3) eligibility for such insurance; (4) whether premiums have been paid on time, and whether payment of premiums is waived by reason of disability; (5) conversion and exchange privileges; (6) cash values and loan privileges on other than term policies; and (7) many of the other matters which have given rise to the mass of litigation over life insurance.

Furthermore, the Court of Appeals' construction of 38 U.S.C. 784—which so narrowly confines the scope of litigation under the N.S.L.I. Act—is in conflict with the interpretation of that section of the Act given in *United States* v. *Zazove*, 334 U.S. 602, and *United States* v. *Roberts*, 192 F. 2d 893 (C.A. 5).

2. The Court of Appeals gave another reason for holding that the required jurisdictional "disagreement" is not present in *Deering* and *Mabutt:* Since the "Government admits the plaintiffs' right to those dividends" . . . "disbursed them from the Insurance Fund and credited plaintiffs' accounts by offsetting the erroneous claims of the Government under the Soldiers' and Sailors' Civil Relief Act", the cases "do *not* involve any disagreement about dividends under the Insurance Act", but merely involve disagreement as to the validity of the offset. This is saying that if the complaint discloses the court's jurisdiction under a federal statute, such jurisdiction can be defeated by an answer drawn to avoid the federal question presented in the complaint, by disclosing that the ultimate decision of the court depends on another question of law. This places an additional unwarranted restriction on the scope of litigation under the N.S.L.I. Act, and is in conflict with *South Covington Ry. Co.* v. *Newport*, 259 U.S. 97; and *St. Paul, M. & M. Ry. Co.* v. *St. Paul & N.P.R. Co.*, 68 F. 2d 10 (C.C.A. 8). The reasoning by which the Court of Appeals apparently reached this result is: Offset constitutes "payment"; therefore, the "true dispute" concerns the validity of the offset; and, consequently, jurisdiction under the N.S.L.I. Act is defeated. This is in conflict with *United States* v. *Isthmian S.S. Co.*, 359 U.S. 314.

3. Upon the authority of *United States* v. *Christenson*, 207 F. 2d 757 (C.A. 10), the Court of Appeals also held that the jurisdictional "disagreement" under the N.S.L.I. Act "must include * * * a claim or protest and a denial", which "is absent" in *Deering* and *Mabbatt*. The Government admitted that each of the similarly situated veterans represented in the cases at bar had filed claim for his dividend. From this and the citation of the *Christenson* case it is clear that the Court of Appeals has held that the claims had not been denied, because the offset asserted against the dividends constituted "payment" thereof, and an "allowance" rather than a "denial" of the claims. As pointed out above this holding is in conflict with *United States* v. *Isthmian S.S. Co.*, *supra*. It is still another unwarranted limitation on the right of N.S.L.I. policyholders to obtain judicial review of disputes arising under their insurance contracts. If there is no "denial" of a claim when an offset is taken against the amount claimed, and, if because there is no "denial" suit will not lie under the N.S.L.I. Act to test the validity of the offset, *the Act* leaves the policyholders without legal means to protect themselves against a groundless offset asserted by the Administrator, or even to question the amount thereof. Whether Congress intended such as result is certainly a federal question of importance which has not been—but should be—settled by this Court.

B. Jurisdiction in *Emmet*.

1. When and under what circumstances do the federal courts have jurisdiction to grant specific relief against an officer of the United States purporting to

act in the name of the sovereign? This is an important federal question, as is shown by the number of occasions on which it has been before this Court. The facts here show that the Administrator of Veterans Affairs wrongfully seized monies to which the plaintiffs had title; that the seizure was beyond his delegated powers because it was based upon a *demonstrably* erroneous construction of a federal statute; and because such seizure was specifically prohibited by another statute. The District Court found that in these circumstances it had jurisdiction to grant the specific relief prayed for in *Emmet*. The Court of Appeals reversed and in doing so rendered a decision in conflict with *Smith* v. *Jackson*, 246 U.S. 388; *Sloan Shipyard Corp.* v. *U. S. Fleet Corp.*, 258 U.S. 549; *Land* v. *Dollar*, 330 U.S. 731; *Larson* v. *Domestic and Foreign Corp.*, 337 U.S. 682; *Harmon* v. *Brucker*, 355 U.S. 579; *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309.

2. An important question of judicial administration pertaining to the exercise of federal equity jurisdiction is: When officers of the sovereign have a ministerial duty to pay funds to 8,440 veterans, and attorneys have an equitable right in the funds for attorneys' fees as against said veterans may the attorneys have relief against the officers of the sovereign through a writ of mandamus? In reversing the District Court and holding that it did not have *power* to issue the writ granting such relief to the attorneys in the *Emmet* case, the Court of Appeals is in conflict with *Houston* v. *Ormes*, 252 U.S. 465, and *Folsom* v. *McDonald*, 237 F. 2d 380 (C.A. 4); as well as with *Lafferty* v. *Humphrey*, 101 U.S. App. D.C. 222, 248 F. 2d 82.

3. Another important question of judicial administration is whether the federal courts in the exercise

of their equity powers may through a writ of mandamus compel officers of the Government to pay interest, when a statute imposes a ministerial duty on them to do so. In reversing the District Court in the *Emmet* case and holding that it did not have *power* to compel payment of interest by writ of mandamus, the Court of Appeals has rendered a decision in conflict with *Roberts, Treasurer* v. *United States*, 176 U.S. 221.

C. Interest

1. The evidence establishes that monies (dividends) payable out of the interest-bearing National Service Life Insurance (Trust) Fund created by 38 U.S.C. 720 were not paid to the veterans entitled thereto but instead were wrongfully converted to the use of the United States. The District Court held that under such circumstances the N.S.L.I. Act provides for the payment of interest on the monies thus misappropriated.

The Court of Appeals reversed, stating that " . . . pre-judgment interest cannot be assessed against the Government in the absence of a specific provision authorizing such assessments", and "There is no authority in the National Service Life Insurance Act for the allowance of interest claimed . . . in these actions.". This ruling of the Court of Appeals and the reasons assigned therefor raise important questions of federal law, of immediate interest to several thousand veterans here represented, and ultimately affecting the millions (R. 122) of N.S.L.I. policyholders. Some of those questions have importance far beyond the National Service Life Insurance Act. All of the questions raised should be settled by this Court.

Only by holding (1) that the trust relationship present here is without effect or by holding (2) that the consent to pay interest on misappropriated dividends must be spelled out *in haec verba* in the Act, can the disallowance of interest by the Court of Appeals be upheld.

If a trustee who wrongfully takes trust monies for his own use is not required to restore to the beneficiary the interest which the trust funds would have earned but for the wrongful taking, it would seem that the trustee is not accountable for anything. The decision below leaves the United States virtually without obligations as a trustee. The decision that the trust relationship is without effect, that the beneficiaries of an express trust have no enforceable rights against the trustee (consent to sue having been granted), is in direct conflict with *United States* v. *Mille Lac Band*, 229 U.S. 498; it held that the United States as trustee is liable for interest on misappropriated trust funds. Beyond this, the decision affects every person who is a beneficiary of an interest-bearing trust fund of which the United States is trustee, and has important implications for beneficiaries of trust funds which are not interest bearing. The United States is trustee of many trust funds (some ninety-one are listed in 31 U.S.C. 725 (s)) and certainly questions of great importance are raised here which ought to be settled to the extent that this Court can settle them within the context of this case.

In apparent reliance on a dictum in *United States* v. *N.Y. Rayon Co.*, 329 U.S. 654, 659, the court below seems to be saying that the Congressional consent to pay interest must be spelled out *in haec verba*. As our argument demonstrates, the insurance contracts here

involved *expressly* provide for the payment of interest on dividends left in the fund; and by the clearest implication from the trust relationship dividends misappropriated from the fund by the trustee remain in the fund in legal contemplation. The holding that the consent to pay interest must be spelled out *in haec verba* is contrary to the holdings in the following decisions of this Court: *Standard Oil Co.* v. *United States*, 267 U.S. 75; *Henkels* v. *Sutherland*, 271 U.S. 298; *United States* v. *Mille Lac Band, supra; United States* v. *Blackfeather*, 155 U.S. 180; and it cannot be reconciled with the reasoning in *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585 (cited by the Court below in support of its ruling and cited in *N.Y. Rayon* for the dictum referred to above); *United States* v. *Standard Rice Co.*, 323 U.S. 106, 111; *Lynch* v. *United States*, 292 U.S. 571, 579; and *United States* v. *Worley*, 281 U.S. 339.

2. The Court of Appeals also grounds its denial of interest on this reasoning:

> "Furthermore, since all but the few named parties to these actions will receive payment of their claims *solely* under Public Law 85-586, rather than under the judgments rendered in these cases, the terms of such payments are to be determined by such statute. It expressly states that the payments authorized are 'without interest'.".

If plaintiffs and those similarly situated had a legal right to interest under the N.S.L.I. Act before the enactment of P.L. 85-586 and the Court is holding that P.L. 85-586 has taken away that right, the Court is sanctioning Congressional confiscation of a property right without just compensation, and its holding is

squarely in conflict with *Lynch* v. *United States*, 292 U.S. 571.

On the other hand, if the Court is holding that these class actions did not toll the statutes of limitations as to non-intervenors, so that those veterans' legal right to interest was barred, leaving Congress free to impose whatever conditions it pleased on what then would be a gratuity conferred by P.L. 85-586, the holding is in conflict with all of the cases on the effect of class actions on the statutes of limitation, as we show under Heading D. 2, *infra*.

Whichever interpretation be placed on the Court's language quoted above, the language should not be allowed to stand as an expression of the law. As *Lynch* clearly demonstrates, the Fifth Amendment forbids the result which would follow from the first interpretation. To accept the second interpretation, as we show under Heading D. 2, *infra*, would prevent class actions from fulfilling the functions for which they were developed; and this involves important questions of federal law which have not been—but should be—settled by this Court.

D. Class Actions

With respect to the classification, scope and effect of class actions under Rule 23 (a) of the Federal Rules of Civil Procedure, the lower federal courts, text writers and commentators seem to be in agreement in only one respect: *This area of the law is in a state of confusion.* 46 Columbia L.R. 818, 822; 3 Moore, Federal Practice 3456. As shown by the opinion of the Court of Appeals in these actions, "confusion now hath made his masterpiece". The attention

of this Court is urgently needed to shed light upon and reestablish clarity in this area of the law; in its present state lawyers cannot use and judges cannot deal with class actions with confidence or precision, and in turn litigants for whom Rule 23 (a) was promulgated are denied remedies which it was supposed to make available to them, and are thus denied enforcement of their legal rights.

The opinion of the Court of Appeals does not state whether it considers these suits to be "hybrid" class actions coming within subdivision (2) or "spurious" class actions coming within subdivision (3) of Rule 23. We believe that the District Court was correct in finding that these class actions come within subdivision (2) of the Rule. The evidence establishes that the claims of the class members are several, and that the object of the actions is the "adjudication of claims which *do* or *may* affect specific property involved". If the Court of Appeals considered them to be subdivision (2) class actions, its reversal of the District Court's judgments establishes that subdivision (2) class actions do not toll the applicable statutes of limitation for represented, but absent, members of the class, and the judgments entered therein are not *res judicata* even as to their rights in the "specific property" involved, unless they intervene at some stage of the proceeding. This is in conflict with *Dickinson* v. *Burnham*, 197 F. 2d 973, 980 (C.A. 2); *Clackamas County, Oregon* v. *McKay*, 94 U.S. App. D.C. 108, 219 F. 2d 479; 3 Moore, Federal Practice, Sec. 23.11 (4) and (5), pp. 3468-3472; Sec. 23.12, p. 3476.

Furthermore, the opinion does not state *when* the absent members must intervene in order to escape the

bar of limitations. It indicates that they must either intervene prior to the entry of the trial court's judgment or before the termination of appeals from that judgment. This raises doubts as to *when* similarly situated persons must intervene in either a subdivision (2) or (3) class action in order to protect their rights. If such persons *must* intervene they *should know when* to do so. If they cannot be *sure*, they will have to intervene before trial to protect their rights, with consequent unnecessary expense to themselves and work for the court.

If the Court of Appeals considered the cases at bar to be "spurious" class actions under Rule 23 (a) (3), it has adopted the idea, advanced by Professor Moore, that subdivision (3) is no more than "a permissive joinder device". This idea has led some of the lower federal courts astray. It has caused them to forget that prior to the adoption of Rule 23 a spurious class action tolled the applicable statutes of limitation for absent class members and a judgment entered therein was *res judicata* as to them, *provided* they were adequately represented and the requirements of due process were satisfied. *Hansberry* v. *Lee*, 311 U.S. 32. It has also caused those courts to forget that Rule 23 was a restatement of Federal Equity Rule 38 and a codification of existing case law. In this connection, Professor Moore and the courts that have accepted his theory say that "there is no substantial question of representation" in subdivision (3) cases.

The Court of Appeals for the Second Circuit has adopted Professor Moore's idea and held that a subdivision (3) class action tolls the statute of limitations and is *res judicata* only for those members of the class who do intervene prior to entry of judgment. For

example, see *York* v. *Guaranty Trust Co.*, 143 F. 2d 503, 529 (C.A. 2). As stated above, if the Court below considered the cases at bar to be "spurious" class actions, its holding is to the same effect, in that it requires intervention at some time. Such holding is in conflict with *National Hairdressers & C. Ass'n.* v. *Philad. Co., Appellant*, 129 F. 2d 1020 (C.A. 3) which, upon the opinion of the district court judge, affirmed *per curiam* the judgment in *National Hairdressers & C. Ass'n.* v. *Philad. Co.*, 41 F. Supp. 701. In that case the District Court held that a judgment entered in a subdivision (3) class action in *favor* of 5000 absent members of the class was *res judicata* as to them. It so held because as to these non-intervenors there were no issues remaining to be tried, the single plaintiff had adequately represented them and the requirements of due process had been met. (Cf. *Pennsylvania R. Co.* v. *United States*, 111 F. Supp. 80, 90 which holds that an *unfavorable judgment* in a subdivision (3) class action does not bind the members of the class who are not parties to the suit.) The holding of the Court below is also in conflict with *Weeks* v. *Barco Oil Co.*, 125 F. 2d 84 (C.A. 7), which held upon the authority of *Hansberry* v. *Lee*, *supra*, that the judgment in a subdivision (3) class action is *res judicata* as to the absent members. It is obvious that if such judgments are *res judicata* as to absent class members, intervention is not required to toll the statutes of limitation for them.

It is true that *Kainz* v. *Anheuser-Busch, Inc.*, 194 F. 2d 737, 742 (C.A. 7), cites the *Weeks* case for the proposition that when damages to be awarded in a subdivision (3) class action would be in different

amounts to separate individuals, the persons entitled thereto must be made parties or intervenors before the damages can be awarded. This holding indicates only that intervention is required in a "spurious" class action when issues of fact as to the different amounts owing to each absent class member remain to be proved.

In the cases at bar *such proof* is *not* required. The respondents are liable to each class member in a fixed though different amount, which has been determined by the Administrator of Veterans Affairs through "mathematical calculation".

We submit that even this brief discussion strongly suggests that unless adequacy of representation and satisfaction of the due process requirement are reestablished as the tests of the binding effect of the judgment on absent members in a subdivision (3) class action, confusion will continue to reign. If these tests are passed, is it still necessary for the absent class members to intervene in order to be saved from the bar of limitations and to participate in the relief granted, regardless of their number and the fact that intervention will serve no useful purpose? If it is necessary, as the Court of Appeals held, then the class action device is no longer a faithful servant of the law and equity; many of the difficulties it was designed to overcome are still with us and its mission has not been fully accomplished.

If this device is to have any vitality or utility in the years ahead, this Court must step in, straighten out the confusion and conflicts which exist, and give the courts, the legal profession and litigants rules which can be applied and which will accomplish justice.

E. Litigation Costs and Attorneys' Fees:

The District Court, exercising its discretion under its broad equity powers, allowed attorneys' fees of 5% (amounting to about $10.00 per veteran) against the funds to be returned to all 8,440 veterans by reason of the *combined effect* of the legal services rendered in *Plesha, Hormel, Deering, Mabbutt* and *Emmet* (R. 145).

It is petitioners' position that the Court of Appeals, in reversing the District Court, is in conflict with the decisions of this Court in *Sprague* v. *Ticonic Bank*, 307 U.S. 161 and *United States* v. *Equitable Trust Co.*, 283 U.S. 738.

In *United States* v. *Equitable Trust Co.* this Court said:

> "It is a general rule of courts of equity that a trust fund which has been recovered or preserved through [litigation] may be charged with costs and expenses, including reasonable attorneys' fees. . . . Such a rule of practice . . . is absolutely essential to the safety and security of a large number of persons who are entitled to the protection of the law—indeed, stand most in need of it—but who are incompetent to know when they are wronged, or to ask for protection or redress." (238 U.S. at 744).

While the Court was there speaking of protecting the rights of mental incompetents, its language is equally applicable to persons whose claims are so small that they cannot prosecute them. Generally, the veterans affected by these class actions are economically incompetent to protect themselves as individuals. Only through the class action device can they secure

adequate legal representation to assure protection of their individual rights. The fact that the large group here affected are beneficiaries of a common trust brings these cases very close to *Equitable Trust*.

In the cases at bar petitioners' attorneys have devoted thousands of hours (R. 153) plus loyalty and ingenuity (R. 144), and petitioners have expended thousands of dollars (R. 154) for the advancement and protection of the interests of thousands of persons whose small individual claims (averaging less than $200—R. 145) did not permit them to act individually. If the decision below stands, in the future such groups will go unrepresented, for no one claimant is likely to be so "brave" as to take on his own shoulders the expense of the entire proceeding; and few attorneys will be willing or able to devote the necessary time and effort if they know in advance, from reading the opinion of the Court of Appeals, that they cannot be compensated for so doing.

The net result of denying apportionment of costs and fees in cases such as these at bar is to deny enforcement of meritorious claims. Such claims will go by default, not because they could not be enforced, but because unnecessary and unwise limitations and restrictions are placed on the means for securing the remedy.

Furthermore, in holding that the District Court had no power to award attorneys' fees from the funds held by the Administrator of Veterans Affairs pursuant to the injunction of the District Court, the Court of Appeals has dealt a crippling blow to the equity powers of the federal courts, as enunciated in the *Sprague* case. In *Sprague*, this Court held:

> "But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation. As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility." (307 U.S. at 167)

We have shown in the argument on class actions (Heading D, *infra*) that whether these cases are "hybrid" class actions falling within subdivision (2) of Rule 23 (a) of the Federal Rules of Civil Procedure, or "spurious" class actions falling within subdivision (3) of that Rule, they have tolled the applicable statutes of limitation and thus preserved the legal rights of several thousand similarly situated veterans to recover the monies illegally taken from them. If such monies, as part of the National Service Life Insurance Fund, or the Soldiers' and Sailors' Civil Relief Revolving Fund, or as Congressional appropriations from which said veterans were entitled to payment, are "specific property", then the cases at bar are subdivision (2) class actions and the decrees of the District Court automatically established a fund in which those veterans could participate. If such monies are not "specific property" and these cases are subdivision (3) class actions, they have created a fund for said veterans through *stare decisis*, even if the absent members must intervene in order to participate in the recovery. Thus it is seen that the requirements of *Sprague* have been met and the holding of the Court

of Appeals is in conflict with that decision of the Supreme Court. Review of that holding by this Court is essential to the administration of justice in the exercise of federal equity jurisdiction.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF WRIT

A. Jurisdiction in *Deering* and *Mabbutt*.

1. Under the National Service Life Insurance Act (38 U.S.C. 784(a) formerly 38 U.S.C. 445 and 817 consent to suit is given:

> "In the event of disagreement as to claim, including claim for refund of premiums under contract of National Service Life Insurance . . . an action on the claim may be brought against the United States either in the United States District Court for the District of Columbia or in the district court [of plaintiff's residence]."

Restating material formerly in Section 445, 38 U.S.C. 784 (h) provides in part: "The term 'claim' as used in this section means any writing which uses words showing an intention to claim *insurance benefits*: . . ."

The Court of Appeals held that venue in the *Deering* and *Mabbutt* suits does not lie in the District of Columbia, and that those cases were improperly transferred to that district, because dividends do not qualify as "insurance benefits"; therefore, there is no "disagreement" as to an "insurance benefit" and consequently no jurisdiction is conferred under the N.S.L.I. Act. This holding is based upon *Candell* v. *United States*, 189 F. 2d 442 (C.A. 10).

The holding in *Candell* that claims for "insurance benefits" include only claims for loss resulting from

contingencies insured against (see 189 F. 2d at 444) is a patently erroneous interpretation of 38 U.S.C. 784. Application of the rationale of *Candell* to any case beyond the narrow limits of the facts there involved (and on its facts it was wrong in holding that there was no jurisdiction) will alter and upset the whole scheme of judicial review of insurance matters established by the N.S.L.I. Act. And that is exactly what the decision of the Court below accomplishes.

Candell was a suit to require the Administrator to keep Candell's 1948 special dividend in the National Service Life Insurance Fund at interest. In dismissing Candell's suit, the Court said that dividends are a return of premiums, not an "insurance benefit", and accordingly that this kind of claim was not within the consent to be sued.

The Court in *Candell* did not discuss and obviously did not consider: (1) 38 U.S.C. 720 (formerly 38 U.S.C. 805 (a)) which provides that the N.S.L.I. (Trust) Fund "shall be available for the payment of *liabilities* under such insurance, including payment of *dividends* . . ."; or (2) 38 U.S.C. 3101 (b) (formerly 38 U.S.C. 454 (a)) which prohibits set-off by the United States against benefits payable to veterans and refers to "indebtedness arising from overpayment of *dividends . . . or other insurance benefits*. . . ." These provisions demonstrate that dividends *are* "insurance benefits"; and in the light thereof the holding in *Candell* was rejected by Judge Lemmon in *Plesha* v. *United States*, 123 F. Supp. 593, by Judge Halbert in transferring *Mabbutt* (R. 193), by Judge Dimock in transferring *Deering* (R. 176), by Judge Curran in granting the motion to consolidate the three cases at

bar for pre-trial and trial (R. 81), and by Judge Boldt in granting the judgments which the Court of Appeals has reversed (R. 143, 158).

Furthermore, 38 U.S.C. 784 (a) authorizes suit "In the event of disagreement as to claim, *including claim for refund of premiums* . . .". If dividends are a return of premiums as *Caudell* says, and they are, a claim for dividend is a claim for refund of premiums on which suit may be brought whether or not a dividend is an "insurance benefit".

Most important of all, the adoption of *Caudell's* rationale, that the only claims reviewable by the courts are those for indemnification for loss resulting from contingencies insured against, would have some startling and unfortunate consequences. The Administrator's rulings on *all* questions arising out of N.S.L.I. would be immune from judicial review *until* a contingency insured against (death, disability, or reaching the endowment age) had occurred. Withheld from *earlier* judicial review would be such things as disagreements over eligibility for insurance (see *Unger* v. *United States*, 79 F. Supp. 281 and *Gamez* v. *United States*, 95 F. Supp. 656), disagreements with regard to whether premiums had been paid on time (see *Collier* v. *United States*, 90 F. Supp. 215), disagreements as to the existence and continuity of a disability which would excuse payment of premiums (see *United States* v. *Roberts*, 192 F. 2d 893, 896, (C.A. 5)), disagreements over conversion and exchange privileges, disagreements about cash values and loans on other than term policies, as well as disagreements about dividends and all other matters that have given rise to the mass of litigation over life insurance.

As shown by the Historical Note to Section 817 of 38 U.S.C.A. (1952 ed.), that section as originally enacted provided that the Administrator's decision as to waiver of premiums was binding on the courts. However, in 1946 that provision was deleted. The 1946 amendment has been held in *United States* v. *Roberts*, *supra*, and in *United States* v. *Zazove*, 334 U.S. 602, 611, to indicate a Congressional intent to provide *timely* judicial review and thus eliminate the finality of decisions of the Administrator on insurance matters. However, if a suit can be maintained under the N.S.L.I. Act only upon the happening of an event insured against, as *Candell* held, the "insurance contract" is not really a contract at all and the value of the insurance is greatly impaired.

2. The Court of Appeals also held that the N.S.L.I. Act does not afford a jurisdictional basis for the *Derring* and *Mabbutt* suits because:

> "The cases before us do not involve any disagreement about dividends under the Insurance Act. The Government admits the plaintiffs' right to those dividends. It disbursed them from the Insurance Fund and credited plaintiffs' accounts by offsetting the erroneous claims of the Government under the Soldiers' and Sailors' Civil Relief Act."

The above quoted statement is merely an acceptance of a variant of the argument which has been asserted on behalf of the United States and rejected by the courts since *Plesha* and *Hormel* were district court cases. The argument is based upon *United States* v. *New York, N. H. & H. R. Co.*, 355 U.S. 253 and *Alcoa Steamship Co. v. United States*, 338 U.S. 421. It is that the offset asserted against the dividend constituted

"payment" thereof; and, accordingly, that the "true dispute" between the parties concerns the validity of the offset, not a "disagreement *as to any claim* * * * under a contract of insurance", and that, inasmuch as jurisdiction depends upon the "true dispute" as revealed in the answer, the *Deering* and *Mabbutt* cases cannot be maintained under the N.S.L.I. Act. This argument was expressly repudiated in *United States* v. *Isthmian S.S. Co.*, 359 U.S. 314. It held: (1) "But recognizing the Government's long-standing power to setoff is far different from finding that the Government's setoff is 'payment' * * * *In this context, 'payment' connotes tender by the debtor with the intention to satisfy the debt coupled with its acceptance as satisfaction by the creditor.*"; and (2) as to the traditional meaning of the defense of payment, the *New York, N.H. & H. R. Co.* and *Alcoa Steamship Co.* cases "indicate no more than when the pleadings properly in the case, taken together, indicate that there are disputes as to issues not raised in the complaint, those issues will be determined". The emphasized portion of the quotation from the *Isthmian* case points out why offset could not be "payment" under the facts in *Deering* and *Mabbutt* and why after the offset, there continued to be a "disagreement" as to claims arising under the N.S.L.I. contracts. The insurance contracts entitled the policyholders to payment of their dividends "in cash only", and they were not willing to accept the crediting of their accounts under the Soldiers' and Sailors' Civil Relief Act as satisfaction of the insurers' obligations. On application forms supplied by the Administrator, each veteran had made claim for the dividend "to be mailed to the address shown" on the application (Plt's Exh.

4, pp. 253-256). By V.A. Reg. 8.26a, 14 F.R. 2832, May 28, 1949 (R. 125) the Administrator directed that that dividend "shall be paid in cash only". The Regulation constituted a part of the N.S.L.I. contracts. *United States* v. *Zazove*, *supra*, 611. *Crediting* the veterans' accounts by offsetting invalid claims of the Government cannot by any stretch of the imagination be said to be payment "*in cash only*". Even if the Government's claims had been valid, the *credit* given to the veterans would not have been payment in cash. This is illustrated by *Candell* v. *United States*, *supra*, where the Administrator resisted the demand that plaintiff's special dividend be credited to his N.S.L.I. account as an interest-bearing deposit, on the ground that to do so would violate the Regulation requiring payment "in cash only". *Shaull* v. *United States*, 82 U.S. App. D.C., 174, 161 F. 2d 181, holds that suit will lie under the N.S.L.I. Act when there is "disagreement * * * as to the manner in which the proceeds [of N.S.L.I.] should be disbursed.".

Of equal importance is the fact that adoption of the "true dispute" as the test for jurisdiction would fly in the face of the established rule that jurisdiction is determined by the allegations of the complaint and may not be defeated by the answer. *St. Paul M. & M. Ry. Co.* v. *St. Paul & N.P.R. Co.*, 68 F. 2, 10 (C.C.A. 10) holds:

> "if jurisdiction is fairly disclosed by the plaintiff's statement of his own cause of action, it cannot be defeated by an answer or plea so conceived and drawn as to avoid the consideration of any federal question or questions. In other words, as was said, in substance, in *Osborn* v. *Bank*, 9 Wheat. 738, 824, the right of the plaintiff to sue does not depend upon the defense which the defendant may

> choose to set up, because the right to sue exists, if at all, before any defense is made, and must be judged exclusively as of the date of the filing of the complaint, on the state of facts therein disclosed. If, on the face of the complaint or declaration, the case is one which the court has the power to hear and determine, because of the existence of a federal question, it has the right to decide every issue that may subsequently be raised, and whether the decision of the case ultimately turns on a question of federal, local, or general law is a matter that in no wise affects the jurisdiction of the court.".

This holding is cited with approval in *South Covington Ry. Co.* v. *Newport*, 259 U.S. 97, 100 which held to the same effect. See also *The Fair* v. *Kohler Die Co.*, 228 U.S. 22, 25 and *Montana-Dakota Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249.

If the law required that instead of testing jurisdiction by the allegations of the complaint, jurisdiction is to be determined by the "true dispute", as the Court of Appeals held, the door would be open to all sorts of maneuvering, and counsel for the Government would have a new and powerful weapon with which to confuse or defeat on purely technical grounds challenges to arbitrary government action. For example, see *Grace Line, Inc.* v. *United States*, 255 F. 2d 810 (C.A. 2). To raise all kinds of uncertainties about jurisdiction, venue and procedure, the Government would need only raise as a defense an issue triable under a different jurisdictional statute. If a defense could be found which involved subject matter on which the United States had not consented to be sued, the original claim could be defeated entirely. For example, in *Hormel* v. *United States*, 123 F. Supp. 806, the Government in-

sisted that the Court did not have jurisdiction under the N.S.L.I. Act because the "true dispute" was over the validity of its offset rather than a claim under the N.S.L.I. Act, and consequently that the N.S.L.I. Act did not confer jurisdiction; wherefore, the Government argued, the Administrator's action was not subject to any judicial review (even under the Tucker Act) because 38 U.S.C. 11 a-2 prohibits judicial review of his decisions, except as authorized in the N.S.L.I. Act. The court saw the fallacy of this argument and took jurisdiction. The same was true in *Plesha* v. *United States*, 123 F. Supp. 593.

3. The Court of Appeals' final statement on 38 U.S.C. 784 and the venue issue is: "the disagreement which is a prerequisite to a suit under the Insurance Act must include the filing of a claim or protest and a denial. That is absent here. *United States* v. *Christenson*, 207 F. 2d 757 (C.A. 10th Cir. 1953).". The record establishes that the defendants in all three of these class actions repeatedly admitted that the plaintiffs and intervenors *did* file claims for the special dividends (R. 26, 30, 119-124, 191) and one of the facts stipulated for trial is that "Several thousand veterans of the armed services are similarly situated to the named plaintiffs and intervenors in these cases." (R. 83). Therefore, the Court of Appeals must be holding that the veterans' claims *have not been denied*, for in *United States* v. *Christenson*, *supra*, upon which the Court relied, the plaintiff had filed a claim and then brought suit thereon while it was being processed by the Veterans Administration and before there had been a "rejection" of the claim. Since the answer to Deering's complaint admitted that the defendant had "refused to pay plaintiff those dividends applied as an

offset" (R. 173), and the other answers filed in these three class actions make similar admissions (R. 26, 28, 30, 49, 52, 55, 58, 61, 64, 67, 73, 191), it is apparent that when the Court of Appeals held that the veterans' claims had not been denied, it meant that withholding and applying the dividends against the debts asserted by the Government constituted "payment" rather than "rejection" of the claims. As shown above, the Court of Appeals is clearly in error, its holding being in conflict with *United States* v. *Isthmian S.S. Co.*, *supra*.

B. Jurisdiction in *Emmet*.

1. The District Court issued the writ of mandamus prayed for in *Emmet* (R. 162). The Court of Appeals determined that "the complaint in the *Emmet* case must be dismissed on jurisdictional grounds insofar as it applies to mandamus".

The issues thus presented for review are governed by the principles set forth in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682. It teaches that action of the sovereign may not be directed by mandamus; but that when (1) an officer, acting in the name of the sovereign, wrongfully seizes specific property or *moneys* (337 U.S. at 688) to which the plaintiffs have title, *and* (2) the officer, in committing that wrong, exceeds the powers delegated to him by the sovereign, *then* his action is not that of the sovereign, and mandamus will lie to compel him to return the same.

Under Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, as originally enacted, the Government had no right to reimbursement for expenditures it made as a result of lapse of servicemens' protected commercial insurance. *United States* v. *Plesha*, 352

U.S. 202. Therefore, when the Administrator of Veterans Affairs attempted to obtain such reimbursement by seizing disability compensation and National Service Life Insurance dividends to which the plaintiff, intervenors and similarly situated veterans in *Emmet* had title, the seizure was wrongful.

Also, as shown below, the offset of the Government's claims arising under Article IV of the Civil Relief Act against the disability compensation and insurance dividends is specifically prohibited. But even if it had not been prohibited, the seizure exceeded the Administrator's delegated powers, being an unauthorized exercise of the Government's established power of offset. This is so because in this instance the Administrator's exercise of the offset power was based upon his erroneous construction of Article IV. Since this mistake of law did not turn on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute was *not* a distinct and profound exercise of discretion. *Plesha* held that (a) the 1940 Act contained "*nothing* which indicated that an ex-soldier had to reimburse the Government for any balance if paid" on his lapsed commercial insurance; (b) "The Government's claim for reimbursement *is refuted* by the legislative history"; (c) "The administration of the 1918 and 1940 Acts *does not support* the Government's claim for reimbursement."; and (d) the "contract, prepared by the Veterans' Administration, *contained no suggestion* to soldiers that they would be expected to reimburse the Government for its payment of premiums if they permitted their policies to lapse". Cf. *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309.

In this connection it is important to note that the 1942 amendment to Article IV of the Soldiers' and Sailors' Civil Relief Act could not by any stretch of the imagination be deemed to be a direction to the Administrator to exercise the Government's offset power to collect the amount it had expended under Article IV *prior to 1942*. The amendment provides:

> "The amount paid by the United States to an insurer on account of applications approved under the provisions of this article, *as amended*, shall become a debt due to the United States by the insured on whose account payment was made, and *notwithstanding any other Act, such amount may be collected either by deduction from any amount due said insured by the United States* or as otherwise authorized by law." Act of Oct. 6, 1942, c. 581, § 13, 56 Stat. 775; 50 App. U.S.C. 546.

As emphasized in footnote 12 of this Court's decision in *Plesha*, this statutory language clearly means that the amount to be collected by offset is the amount paid by the United States to an insurer on account of applications approved *after October 6, 1942*.

The reason why the 1942 amendment provided for the offset power "*notwithstanding any other Act*", is that another statute:

> "prohibit[s] the *collection by setoff* or otherwise out of any benefits payable pursuant to any law administered by the Veterans' Administration * * * of any claim of the United States * * * against any beneficiary * * * except amounts due the United States by such beneficiary * * * by reason of overpayments or illegal payments made under such laws to such beneficiary * * * if the benefits * * * are insurance payable by reason of yearly renewable term insurance, United States Government life

> insurance or National Service Life Insurance issued by the United States, the exemption * * * *shall not apply to* indebtedness existing against the particular insurance contract upon the maturity of which the claim is based, whether such indebtedness is in the form of liens to secure unpaid premiums or loans, or interest on such premiums or loans, or indebtedness arising from overpayments of dividends, refunds, loans or other insurance benefits * * *." 38 U.S.C. 3101 (b).

In sponsoring this legislation the Administrator of Veterans Affairs wrote on May 24, 1940 to the Chairman, Committee on Finance, United States Senate, as follows:

> "The present section 3 * * * also required in many instances collection from compensation, pension or insurance a debt of a beneficiary due the United States as the result of some transaction wholly unconnected with the benefit otherwise payable to such beneficiary. *It is the feeling of the Veterans Administration that the United States should not collect its indebtedness from veterans and their dependents except when the overpayment arose with the specific type of benefit from which collection is to be made* * * *" (S. Rept. 2198, 76th Cong., 3d Sess.)

The "feeling of the Veterans Administration" became the views of the Senate (Cong. Record, Vol. 86, Part 12, p. 13382) and of the House (H. Rept. 1814, 76th Cong., 3d Sess.). Moreover, before agreeing to a Senate amendment, the House obtained a statement from the Veterans Administration as to the significance of such amendment and inserted that statement in the Congressional Record, as follows:

"Senate amendments to H.R. 8930, 76th Cong.

* * * * * * * * *

3. This amendment would amend section 3 of H.R. 8930 which has to do with the prohibition of collection of indebtedness due the United States by set-off or otherwise * * * of benefits payable under laws administered by the Veterans' Administration. The amendment would have the effect of clarifying the provisions in the particular section which provides that the *exemption provided in the section shall be inapplicable to indebtedness existing against the particular insurance contract upon the maturity of which the claim is based. The amendment is for the purpose of removing any doubts as to the type of indebtedness relating to insurance.* (Cong. Rec., Vol. 86, Part 12, pp. 13489, 13490).

In the light of the legislative history it appears that the Government is prohibited from offsetting any claim against a beneficiary's disability compensation, except a claim arising out of an overpayment or illegal payment of disability compensation; and is prohibited from offsetting any claim against a beneficiary's N.S.L.I. dividend, except a claim arising out of an overpayment or illegal payment on said insurance.

Even if the statute permits collection of claims of the United States by offset against disability compensation and N.S.L.I when the claims arise out of *other types* of veterans' benefits, it is clear that the Administrator's seizure of plaintiffs' disability compensation and N.S.L.I. dividend is prohibited. This is true because plaintiffs did not become indebted to the United States as a result of the payments the Government made on their lapsed commercial insurance. There-

fore, those payments did not constitute *overpayments* of any type of veterans' benefits.

Since the Administrator exceeded his delegated powers in taking the offset, his action did "not constitute an exercise of his administrative discretion and, in such circumstances, * * * judicial relief from this illegality" is available through a writ of mandamus. *Harmon* v. *Brucker*, 355 U.S. 579, 582.

2. Apparently losing sight of the facts that the Administrator wrongfully had seized monies to which the plaintiffs in *Emmet* had title, and had exceeded his delegated powers in committing that wrong, the Court of Appeals held *first*: The extraordinary remedy of mandamus was not available for the purpose of recovering the monies "inasmuch as the Tucker Act provided an adequate remedy at law to test the question. The pecuniary liability of the United States may be determined only through such procedures as the United States has authorized.". This statement of the law cannot be reconciled with *Smith* v. *Jackson*, 246 U.S. 388, which affirmed a decree for specific relief directing payment of a judge's salary without offsets, because the offsets were illegal, being beyond the delegated power of the Government officer who made them. The judge could have sued under the Tucker Act.

That theory also has been repudiated in *Land* v. *Dollar*, 330 U.S. 731, 738, in the following language:

> "But public officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side

> of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.".

In Mr. Justice Frankfurter's dissenting opinion (the majority opinion is to the same effect on this point) in *Larson* v. *Domestic & Foreign Corp.*, *supra*, it is stated at 722, 723:

> "But the general statute permitting suit in the Court of Claims in certain instances against the Government is not a statute that provides that remedies otherwise at the plaintiff's command are to be displaced. A holding that the availability of an action for monetary damages in the Court of Claims against the United States prevents a suit at law, or, if the necessary requisites for equity jurisdiction are present, in equity, against the governmental agent, would be as novel as it is indefensible in the light of the settled course of decisions. Indeed, this argument is not novel, it has been explicitly negatived in at least two cases. See *Sloan Shipyards Corp.* v. *United States Fleet Corp.*, 258 U.S. 549, 567, 568; *Land* v. *Dollar*, 330 U.S. 731, 738".

3. The Court of Appeals also stated that mandamus would not lie in *Emmet* because "a writ of mandamus will be issued only to compel the performance of a ministerial duty as distinguished from one calling for the exercise of discretion" and "The Code vests extensive *unreviewable discretion* in the Administrator to determine matters of law and fact *in this area*. See 38 U.S.C. §§ 785, 211".

Those sections make the decisions of the Administrator final and conclusive on "any question of law or fact concerning a claim for benefits or payments under any Act administered by the Veterans' Administration". But since a debt asserted by the Government is

not "a claim for benefits or payments", those sections do not give the Administrator "unreviewable discretion" to determine the *validity* of the asserted debt. *Harmel* v. *United States*, 123 F. Supp. 806, 809-810; *Hines* v. *United States*, 70 App. D.C. 206, 105 F. 2d 85, 88-89; *United States* v. *Plesha*, *supra*. From this it is obvious that those sections could not possibly place the action to *collect* the asserted debt within the Administrator's "unreviewable discretion". This is particularly so when an officer of the Government exceeds his delegated powers, because *then* his action cannot constitute an exercise of his administrative discretion. *Harmon* v. *Brucker*, *supra*.

4. The Court of Appeals' next statement is that mandamus will not lie in *Emmet* because "a writ of mandamus will be issued only to compel the performance of a ministerial duty as distinguished from one calling for exercise of discretion" and "In this case the amounts claimed had not yet been determined at the time the action was filed". The Court apparently felt that the determination of the amounts owed the veterans involved the exercise of the Administrator's discretion. Even so, the record establishes that more than five years before Emmet's complaint was filed, the Administrator had received Emmet's and each similarly situated veteran's application for a share of the $2,800,000,000 special dividend, and had exercised his discretion completely in determining "by mathematical calculation" the exact amount of the dividend to be paid to each of them. Thereafter he offset the indebtedness erroneously believed to have arisen under the Soldiers' and Sailors' Civil Relief Act of 1940 (R. 122-124). The fact that Emmet did not know the exact amount that had been withheld illegally from each of

the similarly situated veterans had no bearing on the question of whether the Administrator's duty to refund the monies is a ministerial or discretionary duty. Emmet's complaint demanded an accounting on their behalf (R. 13), and a writ of mandamus will lie to compel an accounting, *Sloan Shipyards Corp.* v. *U. S. Fleet Corp.*, 258 U.S. 549, especially where the defendant is a trustee.

5. The Court of Appeals also said that "While this case was pending, the decision in the *Plesha* case and the enactment of Public Law 85-586 settled the major legal issues.". The petitioners can think of only one interpretation that would make that statement significant. Possibly it constitutes an implied holding that the District Court could not issue the writ to compel the return of the principal sums illegally withheld from the veterans, because the *Plesha* decision and P.L. 85-586 had made the issue with respect thereto moot. See *McKay* v. *Clackamas County, Oregon*, 349 U.S. 909. But, as the District Court concluded (R. 159), the issue as to the principal amounts involved in the *Emmet* case was not moot because the specific relief sought was the *immediate* recovery of those principal amounts, and P.L. 85-586 provided for the refund thereof to each veteran, *only if* he made another application therefor within two years from the date of the Public Law's enactment. Furthermore, as the District Court noted, P.L. 85-586 does "not dispose of the claims * * * for interest on the National Service Life Insurance special dividends or dispose of the claim for an allowance of attorneys fee," (R. 159).

6. The Court of Appeals' final statement on mandamus concerns the prayers for the allowance of prejudgment interest on the special dividends and for an allow-

ance of attorneys' fees. The Court said "The way to reach those issues is not by writ of mandamus." But *Houston* v. *Ormes*, 252 U.S. 469, held:

> "In the present case it is conceded, and properly conceded, that payment of the fund in question to the defendant Sanders is a ministerial duty, the performance of which could be compelled by mandamus. But from this it is a necessary consequence that one who has an equitable right in the fund as against Sanders may have relief against the officials of the Treasury through a mandatory writ of injunction * * *".

The decisions in *Folsom* v. *McDonald*, 237 F. 2d 380 (C.A. 4) and *Lafferty* v. *Humphrey*, 101 U.S. App. D.C. 222, 248 F. 2d 82 are comparable to the decision in the *Houston* case. And *Roberts, Treasurer* v. *United States*, 176 U.S. 221 establishes that mandamus will lie to compel the payment of interest wrongfully withheld by an officer of the Government in the name of the sovereign when he has a ministerial duty to pay the same.

C. Interest.

1. The District Court held that where monies payable out of the National Service Life Insurance (Trust) Fund were not paid to persons entitled thereto, but instead were misappropriated by the trustee, the National Service Life Insurance Act (38 U.S.C. 701-724) provides for and requires the payment of interest at the rate of 3% per annum on the amounts misappropriated during the period when such persons were deprived of the use of such moneys and the United States had the use thereof (R. 144, 155, 163, 180, 197).

The Court of Appeals reversed. The first ground given for the reversal is:

> ". . . prejudgment interest cannot be assessed against the Government in the absence of a specific provision authorizing such assessment. . . . There is no authority in the National Service Life Insurance Act for the allowance of [the] interest claimed . . .".

An examination of the Act, the contract forms and the regulations issued thereunder are required to determine whether Congress has consented to and provided for the payment of interest in this situation, and thus to determine whether the District Court or the Court of Appeals was correct.

Section 720 of 38 U.S.C. (formerly 38 U.S.C. 805) creates "*a permanent trust fund* to be known as the National Service Life Insurance Fund"; requires that N.S.L.I. premiums shall be paid into the Trust "which, *together with interest earned thereon* shall be available for the payment of liabilities under such insurance, *including payment of dividends*"; and authorizes the Administrator of Veterans Affairs and the Secretary of the Treasury to perform fiduciary duties of the trustee, including investment of the trust funds in certain interest-bearing obligations.

Section 702 of 38 U.S.C. (formerly 38 U.S.C. 802 (e)) provides:

> "§ 702. Premium rates and policy values—Premium rates for insurance shall be the net rates based upon the American Experience Table of Mortality and interest at the rate of 3 per centum per annum. All cash, loan, paid-up, and extended values, and all other calculations in connection with insurance, shall be based upon said American

Experience Table of Mortality and interest at the rate of 3 per centum per annum."

Several forms of insurance contracts were prescribed and issued. The term insurance policy form (V.A. Form 9-1660—Aug. 1948) provided among other things that the policy would "participate in and receive such dividends from gains and savings of the fund as might be determined by the Administrator." The forms for policies converted to permanent insurance had similar provisions. For example, see V.A. Form (Aug. 1948) 9-1662 26.

Pursuant to a regulation issued under the Act and in effet in 1950, dividends (other than special dividends on converted policies could, upon the request of the insured, remain on deposit in the Fund and earn interest. (38 C.F.R. 1949 ed. 8.26; R. 125). Pursuant to a regulation issued under an amendment to the Act all dividends, including special dividends, declared after January 1, 1952 on all N.S.L.I. policies, are retained for the payment of premiums (unless payment in cash is requested) and the policyholders' dividend credit earns interest. (38 U.S.C. 707; 38 C.F.R. 8.26(b)). As previously mentioned, 38 C.F.R. 8.26(a) provides that the 1950 special dividend was to be paid "in cash only" (R. 77).

An administrative interpretation of the Act is also of interest. In response to the charge made by the Chairman of the House Veterans Committee that the Administrator of Veterans Affairs and the Secretary of the Treasury had invested money in the N.S.L.I. Trust Fund at interest rates below the current market and had thus "failed to discharge their obligations as trustee",[1] the Administrator acknowledged that "the

[1] United Press International release from Washington, D.C., dated January 2, 1960.

Government had guaranteed an interest rate of 3% to the veterans. The policy has been to invest to meet this pledge".[3]

United States v. *Zazove*, 334 U.S. 602, 611, establishes that the N.S.L.I. Act, the regulations issued pursuant thereto and the provisions of the insurance contract itself give rise to an obligation of the Government that has the force of a binding contract with the servicemen insured, but "the statute is an expression of legislative intent rather than the embodiment of an agreement between Congress and the insured person" and, therefore, "Only the intent of Congress, which in this case is the insurer, need be ascertained to fix the meaning of the statutory terms * * *". Insofar as the legislative intent to pay interest can be ascertained from the above noted *specific* provisions of the Act and regulations, it is clear that:

1. The N.S.L.I. Fund is a "*permanent trust fund*" of which the United States is trustee, and the Administrator of Veterans Affairs, acting for the trustee, has definite responsibilities of a fiduciary nature.

2. Premiums are to be deposited in the Fund.

3. Although the Act (38 U.S.C. 720) "authorizes" the Secretary of the Treasury to invest the monies in the trust fund and does not expressly "direct" him to do so, the trustee of a trust fund—here the United States—is *obligated* to invest (*Cavender* v. *Cavender*, 114 U.S. 464, 473); and what Section 720 is doing is to authorize a particular official to carry out that obligation, and to

[3] The Washington Post, Monday, January 4, 1960, p. A-19.

list the kind of securities in which he is authorized to invest. That the Act is a Congressional *direction* to invest is shown by the language that the premiums, "*together with interest* earned thereon, shall be available for the payment of liabilities under such insurance including * * * dividends." (The above quoted exchange between the Chairman of the House Veterans Committee and the Administrator confirms this.)

4. All calculations, including those applicable to dividends, are based on the American Experience Table of Mortality and interest at 3% per annum.

5. Such dividends as are permitted by regulation to remain in the Trust Fund bear interest at 3% per annum.

If the Administrator had asserted the erroneous offset against United States Government life insurance annual dividends, it is beyond dispute that the United States would have remained liable for interest on those dividends during the period of their misappropriation, because United States Government life insurance contracts expressly provide that annual dividends shall *automatically* be left on deposit at interest fixed by the Administrator at not less than 3½% per annum (R. 77; see also Treasury Department, Bureau of War Risk Insurance, Form No. 747). This contractual obligation to pay interest would continue despite the misappropriation.

It is clear that if the Administrator had asserted the erroneous offset against annual dividends that have been declared since 1952 on term and converted N.S.-L.I. policies, which the insureds had elected to have

retained on deposit at interest, the United States would have been liable for interest during the period of misappropriation. As *Zazove* holds, the regulations which permitted the retention of dividends in the Trust Fund at interest are part of the Government's binding contract with the insureds. The misappropriation of the deposit would not abrogate the express agreement to pay interest thereon.

If the United States, without declaring a dividend, had reached into the N.S.L.I. Trust Fund and had taken its offset out of the equity of each of the policyholders in the Fund, there could be no question that turning the interest-bearing right into a cause of action against the United States would not save the United States from interest.

Is there to be a different result where a dividend is declared and is misappropriated to the use of the United States rather than being paid to the insured? The facts that this is a Trust Fund and the United States is the trustee have an important bearing on the question. Under the law of trusts, funds misappropriated from a trust by the trustee in legal contemplation remain in the trust. The trustee is not only liable for the corpus wrongfully removed from the trust, but also for the interest that would have been earned thereon if it had remained in the trust and had been invested properly. *Buffum* v. *Peter Barceloux Co.*; 289 U.S. 227, 236; *May* v. *Le Claire*, 11 Wall. 217; *May* v. *Henderson*, 268 U.S. 111, 110; *McComb* v. *Frink*, 149 U.S. 629, 50 Am. Jur. 400 (Trusts, Sec. 502).

That the law of trusts applies to the United States when it voluntarily assumes the position of trustee is demonstrated by *United States* v. *Mille Lac Band*, 229

U.S. 498. In that case, the United States accepted a cession of certain Indian land in trust, the trust to be executed by sale of the land and deposit of the proceeds in the Treasury to the credit of the Indians, the proceeds to draw interest at 5%. However, the land was not disposed of under the pertinent act of 1889 calling for deposit of the proceeds, but under the general land laws; not for the benefit of the Indians but in disregard of their rights. This Court said (229 U.S. at 509):

> "This was clearly in violation of the trust before described, and the Indians are entitled to recover for the resulting loss. In principle it is as if the lands had been disposed of conformably to the act of 1889, and the net proceeds placed in the trust fund created by §. 7, and the Government then had used the money, not for benefit of the Indians, but for some wholly different purpose. That the wrongful disposal was in obedience to directions given in two resolutions of Congress does not make it any the less a violation of the trust.".

A similar result was reached in *United States* v. *Blackfeather*, 155 U.S. 180, also a trust fund case.

In the light of *Mille Lac Band* and *Blackfeather*, it is petitioners' position that the "*specific*" provisions of the N.S.L.I. Act spell out an express, affirmative and unambiguous Congressional intent that the law of trusts shall govern the *Trust* Fund created by the Act and, consequently, that when the trustee misappropriates monies therefrom, it shall be liable for interest at the rate of 3% per annum from the date of misappropriation.

In reaching a contrary conclusion, the Court of Appeals cited *United States* v. *N. Y. Rayon Co.*, 329 U.S. 654, where in there is a dictum stating that: "There

can be no consent [to pay interest] by implication or by use of ambiguous language.". It thus appears that the Court of Appeals has interpreted the holding in *N. Y. Rayon Co.*—"in the absence of constitutional requirements, interest can be recovered against the United States only if express consent to such recovery has been given by Congress"—to mean that Congressional intent to make the United States liable for prejudgment interest can be found only from a statute which provides for it *in haec verba*. If that were the law the general rule prohibiting the assessment of prejudgment interest against the Government would be extended to a formalistic extreme, which would be repugnant not only to elementary fairness but also to the law that contracts between the United States and its citizens are to be construed by the same standards as contracts made by others. *United States* v. *Standard Rice Co.*, 323 U.S. 106, 111; *Lynch* v. *United States*, 292 U.S. 571, 579.

Moreover, when Congress placed the United States in the insurance business and it failed to pay insurance benefits on the date provided for in the insurance contracts, the Government was held liable for interest from that date, although the statute did not provide for it *in haec verba*. *Standard Oil Co.* v. *United States*, 267 U.S. 76, 79. And when Congress created a Trust Fund and required the United States to pay interest to the beneficiaries thereof, the Government was held liable for that interest from the date it misappropriated the Fund, although the statute creating the Trust did not specifically provide: "Interest payable on funds used conformably to the provisions of this Trust, shall also be payable in the event the trustee mis-

appropriates the Fund." *United States* v. *Mille Lac Band, supra; Mille Lac Indians* v. *United States*, 51 Ct. Cls. 400.

Furthermore, the principal authority for the decision in the *N. Y. Rayon Co.* case is *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585. The latter case holds that it is proper to consider "the circumstances surrounding the use of the term[s]" in a contract [or in an Act], in determining whether the United States intended thereby to require the payment of prejudgment interest. That is precisely what was done in *Henkels* v. *Sutherland*, 271 U.S. 298, where such Congressional intent was found from the statutory requirement that the United States return the "net proceeds" of property mistakenly seized by the Alien Property Custodian. There are circumstances worthy of consideration in determining whether the N.S.L.I. Act expressly, affirmatively and unambiguously provides for the payment of interests on the wrongfully seized dividends. Those circumstances are: The World War I Insurance Act did not create an interest-bearing trust fund; in the light of the experience gained over a period of twenty years in the administration of that insurance program, Congress saw fit to create an interest-bearing trust fund by the N.S.L.I. Act.

In reaching its decision that the N.S.L.I. Act does not provide for the interest claimed in the cases at bar, the Court of Appeals relied on *United States* v. *Worley*, 281 U.S. 339 and *United States* v. *Citizens Loan and Trust Co.*, 316 U.S. 209, which denied interest on death benefits payable under the World War I Insurance Act. Those two cases are not applicable here. As shown above, if dividends declared on such insurance

and left at interest had been misappropriated, the express words of the insurance contracts would have required payment of interest during the period of misappropriation. Neither *Worley* nor *Citizens Loan* held that the World War I Insurance Act did not provide for interest on misappropriated interest-bearing dividends. That question was not presented, and if it had been it is hardly open to doubt that this Court would have found that the Act required the payment of interest.

In the cases at bar there was no right under the insurance contracts in force in 1950 to have special dividends retained at interest in the N.S.L.I. Fund. Thus, if the two Acts *had been* "substantially identical", as the Court of Appeals says they *are*, then *Worley* and *Citizens Loan* might still have some bearing. But the two Acts *were not* "substantially identical" in significant and controlling respects. The N.S.L.I. Act expressly makes the Fund created thereby an interest-bearing "permanent trust fund". The War Risk Insurance Act of October 6, 1917 did not create a trust fund or provide that the premiums paid for the life insurance policies issued thereunder should be invested in interest-bearing obligations; it merely provided that the premiums should be deposited into the Treasury. 40 Stat. 398, Art. I, c. 105 § 20. The death of the insured in *Citizen's Loan* occurred in 1919. It was not until the World War Veterans' Act, 1924 superseded the War Risk Insurance Act of 1917 that the Secretary of the Treasury was authorized to invest the premiums paid on World War I life insurance, which by that time had been denominated United States Government life insurance. 43 Stat. 612, c. 302, 17. The death of the insured in *Worley* occurred in 1927. But it was not until 1934 that Congress classified the United

States Government life insurance fund as a "trust fund", with all monies therein to "be disbursed in compliance with the trust". 31 U.S.C. 725 s (c) (1).

As pointed out above, the fact that the N.S.L.I. Fund is a *trust* fund means that when plaintiffs' special dividends were withdrawn from the trust but wrongfully withheld, those dividends in legal contemplation remained in the interest-bearing fund and were entitled to participate in the earnings of the fund at 3% per annum. Even though the plaintiffs could not have *compelled* the Administrator to retain the special dividends in the fund, he *kept* them there (in legal contemplation) and the trustee cannot avoid the consequences of his wrong.

2. The second reason given by the Court of Appeals for the reversal of the allowance of interest is:

> "Furthermore, since all but the few named parties to these actions will receive payment of their claims *solely under Public Law 85-586*, rather than under the judgments rendered in these cases, the terms of such payments are to be determined by such statute. It expressly states that the payments authorized are "without interest.".

If this pronouncement be read in the light of respondent's concession in the District Court that:

> "We do not contend that enactment of Public Law 85-586 deprives the Court of jurisdiction, if any it may have, to adjudicate the claim of interest * * * This being true, the Act leaves the matter of interest in *status quo*" (Original Record, Vol. 2, C.A. 5658-55),

the Court of Appeals is saying that, except for P.L. 85-586, any legal right to interest which the similarly situated veterans had under the N.S.L.I. Act has been

barred by the statutes of limitation, on the theory that these class actions tolled the statutes only for those class members who intervened prior to entry of the District Court's judgments. If that is what the Court of Appeals means, its holding is contrary to the authorities with respect to the affect of class actions on the defense of limitations, as we show below in Heading D. 2.

If the Court of Appeals pronouncement be read in the light of respondent's brief on appeal, where the concession made in the District Court was repudiated, and wherein they argued:

> "Even if a right to interest might have arisen under the Insurance Act, Congress [by P.L. 85-586] has barred it with respect to these payments.".

the Court of Appeals is saying that these class actions toll the statutes of limitation for all similarly situated veterans who do intervene prior to the final judgments to be entered herein, but that their legal right to interest has been foreclosed by P.L. 85-586. If that is what the Court of Appeals means, its holding countenances a taking of private property without just compensation in violation of the Fifth Amendment, and it is in conflict with *Lynch* v. *United States*, 292 U.S. 571, 579, and *United States* v. *Zazove*, *supra*.

D. Class Actions

1. Decisions Below: The District Court held that the cases at bar are "hybrid" class actions and may be maintained under Rule 23(a)(2) of the Federal Rules of Civil Procedure (R. 157); and that they have tolled the applicable statutes of limitation for the members of the class who have not intervened (R. 153).

These District Court holdings are disposed of by the Court of Appeals in the following language:

> "Furthermore, since all but the few named parties to these actions will receive payment of their claims *solely* under Public Law 85-586, rather than under the judgments rendered in these cases, the terms of such payments are to be determined by such statute. It expressly states that the payments authorized are 'without interest.'"
>
> * * * * *
>
> "Nor did the *Plesha* decision create such a distinct fund for the benefit of the class of claimants either by way of *stare decisis* or otherwise. It merely decided the claims of a few veterans out of about 8,400 who had claims involving a common question of law. Many of those claims would have been defeated by technical defenses, statutes of limitation, voluntary payments or *res judicata*, except for the waiver of such defenses by Congress as set forth in Public Law 85-586. * * *."
>
> "From the small number of claimants who have joined these actions during the four years since the litigation was commenced, it is probable that few will join before judgment. * * * Few more, if any, are likely to join now in view of Public Law 85-586. The saving of so few, out of about 8,400 claimants, from the operation of the statute of limitations is not an adequate reason for imposing attorneys' fees upon all 8,400 litigants."

It is thus seen that the Court of Appeals does not say whether the cases at bar are "hybrid" class actions maintainable under subdivision (2) of Rule 23 or "spurious" class actions maintainable under subdivision (3). As to limitations, the opinion below constitutes a clear holding that the actions do not toll the statutes of limitation except for class members who intervene. It does not make it clear whether they must

intervene prior to the entry of judgment in the District Court or prior to the entry of final judgment. In either event, this holding makes subdivision (3) class actions almost worthless as procedural devices. It has the same effect on subdivision (2) class actions, if the Court of Appeals is holding that these are "hybrid" class actions and that it is necessary for the class members to intervene therein in order to be saved from the defense of limitations.

2. The Nature and Effect of Class Suits: An understanding of class suits described in Rule 23(a)(2) and (3) is essential to fully understand the harmful effects the opinion will have and the extent of the confusion it will heap upon an area of the law that is already in a sad state of confusion, if this Court permits the opinion to stand.

The nature and effect of class suits was firmly established before the adoption of the Federal Rules of Civil Procedure. As stated in *Hansberry* v. *Lee*, 311 U.S. 33, 41-43,

> "The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable. * * * In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree. * * *
>
> "* * * there is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is *res*

judicata as to members of the class who are not formal parties to the suit. * * *

"It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present * * * *or* where the interest of the members of the class, some of whom are present as parties, is joint, * * *.

"In all such cases, so far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume * * * that such procedure affords a protection to the parties who are represented, though absent, which would satisfy the requirements of due process and full faith and credit."

It thus is apparent that prior to the adoption of the Federal Rules, the questions whether a decree should be entered in a class action in which the interest of the members of the class was *not* joint, and whether that decree was binding upon the represented, but absent, members of the class, depended primarily upon whether they were adequately represented by the formal parties to the litigation, and secondarily upon whether the proceedings in the class actions satisfied the requirements of procedural due process.

3. These Governing Principles Have Not Been Changed by Rule 23: In pertinent part, it provides:

"Rule 23. Class Actions

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, *as will fairly insure the adequate representation of all* may, on behalf of all, sue or be

sued, when the character of the right sought to be enforced, for or against the class is

* * * * *

"(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

The Report of Advisory Committee, 1937, Note to Rule 23; and 45 W. Va. L.Q. 5, 16, establish that Rule 23 was intended to be a codification of the case law and a restatement of Federal Equity Rule 38. *Montgomery Ward & Co., Inc.* v. *Langer*, 168 F. 2d 182 (C.A. 8) and *Pelelas* v. *Caterpillar Tractor Co.*, 113 F. 2d 629, 632 (C.A. 7) show that the Rule was not intended to limit or restrict the usefulness of the class action device but to extend it to cases at law as well as in equity. The plain language of the Rule establishes that whether a decree entered in *any* type of class action is binding upon the absent class members, still depends primarily upon whether they have been afforded "adequate representation".

4. Adequacy of Representation: With the foregoing in mind, it is important to note that the District Court found that "the plaintiffs and intervenors in each of these consolidated actions will fairly insure the adequate representation of all the members of each of the classes" (R. 149). This finding has not been challenged. Indeed, plaintiffs have made every effort to insure full and fair representation. On two occasions they tried to have the absent members of the class notified of their right to intervene. Those attempts were unsuccessfully opposed by the Government. See *Hormel*

v. *United States*, 17 F.R.D. 303, and Judge Keech's order in *Emmet* of January 28, 1958 (Original Record, Vol. 1, C.A. 5658-55).

5. Intervention and the Binding Effect of Judgment: Assuming adequate representation of the absent members in a subdivision (2) class action, will the judgment be *res judicata* as to members of the class who do not intervene? Putting it another way, is a decree entered in such a class action in favor of absent members binding upon the defendants, or may the defendants escape the obligations imposd by the decree, if the absent members do not intervene? Before the Rule, intervention was not a precondition to tolling the statute or making the decree *res judicata*. The Rule does not expressly require intervention. Moreover, the authorities interpreting the Rule do not require it, as we shall now show.

According to 3 Moore, Federal Practice, Sec. 23.11 (4) and (5), pp. 3468-3472; Sec. 23.12, p. 3476, a class action satisfying the requirements of subdivision (2) of the Rule is conclusive upon all parties and privies to the proceeding, and upon all claims whether presented in the proceeding or not, insofar as they do or may affect specific property; and, consequently, the prosecution of the action tolls the applicable statutes of limitation for the absent members and the decree entered therein is binding upon them.

As shown above, Moore's conclusion that a "hybrid" class action, in which the absent class members have "adequate representation", can have no effect on their rights *other than* those in the *res* involved, appears to be erroneous. However, his conclusion that a decree entered in a "hybrid" class action is binding upon

the rights of absent class members in the "specific property" involved is established by the results in *Clackamas County, Oregon* v. *McKay*, 94 U.S. App. D.C. 158, 219 F. 2d 479. In that case, the claims of 18 counties were several, specific property was involved, and the absent members were held to be bound by the decree even though their petitions to intervene had been denied. See also *Dickinson* v. *Burnham*, 197 F. 2d 973, 978 (C.A. 2), and *Washington Gas Light Co.* v. *Baker*, 90 U.S. App. D.C. 195, 247 F. 2d 781.

6. These are Hybrid Class Actions: It is now evident that, if the cases at bar come within subdivision (2) of the Rule, there is no necessity for the absent class members to intervene in order to toll the statutes of limitation, and that they and the respondents are bound by a valid decree entered herein, at least insofar as the decree affects specific property.

The District Court found that the claims of the members of the class were "several", and "the object of the(se) action(s) is the adjudication of claims which do or may affect specific property involved in the action(s)" (R. 156, 157). The Court of Appeals did not mention these findings and merely pointed out that the *Plesha* decision did not create a distinct fund for the benefit of the class of claimants either by way of *stare decisis* or otherwise.

Was the District Court correct, and if so what is the specific property affected by these class actions?

The first "specific property" fund involved is the N.S.L.I. Trust Fund. The thousands of similarly situated policyholders represented, but absent, in these class actions all had property rights in that Fund. When the Administrator declared the special dividend

and directed that their respective shares be paid to them from the Fund, their rights thereto became fixed and vested. The object of these actions is the adjudication of their claims for the recovery of that specific trust property and the interest which that specific property would have earned if it had remained in the Trust. The fact that a trustee wrongfully removes monies from a Trust Fund and converts them to its own use does not destroy the specific property character of those trust funds. In legal contemplation, the misappropriated monies remain in the Trust and the trustee holds them in constructive trust. It is for this reason that neither the conversion nor the merging of them with monies of others can defeat the right to maintain a "hybrid" class action to recover the trust funds. *Dickinson* v. *Burnham, supra.*

Furthermore, 38 U.S.C. 719(a) authorizes "to be appropriated out of any money in the Treasury not otherwise appropriated, such sums as may be necessary to carry out the provisions of" the N.S.L.I. Act "for the payment of liabilities under National Service Life Insurance. Payment from this appropriation shall be made * * * by The Administrator." This means that at all material times there were appropriations available to The Administrator to actually do what the law of trusts compels a trustee to do—restore misappropriated funds to the trust, together with interest that would have been earned thereon if the dividends had remained in the Fund, as in legal contemplation they did.

The second "specific property" fund involved is the Soldiers' and Sailors' Civil Relief Revolving Fund. Pursuant to the Act of April 3, 1948 (62 Stat. 160)

the entire $1,643,065.78 which had been collected was placed in this Fund, where it was available for the payment by the Administrator of claims under Article IV of the Civil Relief Act (R. 73-74, 83, 114, 147). Some of this money ($1,500,000) was transferred into the general surplus of the Treasury before these actions were instituted (R. 130, 147-148), but from the time they were commenced until August, 1958, there was never less than $446,000 in this Fund (R. 84, 130, 148); and, pursuant to P.L. 85-586 $1,300,000 of the $1,500,000 which had been transferred from the Fund was restored thereto to enable the Administrator to make refund of the improper collections (R. 130, 150; S. Rept. 1862, 85th Cong., 2d Sess.).

Thus, we see that at all material times there was enough money in or available to the N.S.L.I. (Trust) Fund to pay all of the misappropriated N.S.L.I. dividends with interest; that there was enough more in the Revolving Fund to fully repay the others covered by the class suits—those who had suffered deductions from their disability compensation. As a result of the decision in *Plesha* and the prosecution of these actions, enough money was added to the Revolving Fund by the time of trial to repay all 8440 veterans, including those who suffered deductions from other benefits and those who had paid upon demand or as the result of judgments.

Moreover, Congressional appropriations for the fiscal year 1951, the year in which the withholding of Emmet's disability compensation was commenced (R. 9, 26), and in each succeeding year, were specifically "earmarked" for the payment of such Veterans' compensation "to be immediately expended and to remain

available until expended." For example, see P.L. 759, c. 896, 81st Cong., 2d Sess., 64 Stat.; and P.L. 45, c. 121, 82d Cong., 1st Sess., 65 Stat.

To summarize: If the Funds here involved are not "specific property" and actions such as these are not "hybrid" class actions, so few cases will qualify as "hybrid" that subdivision (2) of Rule 23 will have little usefulness. If the Court of Appeals is saying that even where "specific property" is involved the rights of absent class members in the *res* cannot be affected unless they intervene in the class action, subdivision (2) has been repealed entirely.

7. Effect of Judgment in Subdivision (3) or "Spurious" Class Action: Here there is much uncertainty and confusion. (2 Barron and Holtzoff, Federal Practice and Procedure 144). Much of this apparently has been caused by the fact that Rule 23 (a) breaks class actions into three categories, and by Professor Moore's declaration that the subdivision (3) class action is only a permissive joinder device, a judgment in which will not be binding on anyone who has not intervened before *trial*. (See 3 Moore, Federal Practice, 3418, 3442, 3470-3472). There is well-reasoned opinion to the contrary. See Keeffe, Levy and Donovan, Lee Defeats Ben Hur, 33 Cornell L.Q. 327. Kalven and Rosenfeld, Contemporary Function of the Class Suit, 8 Chi. L.R. 684. Federal Class Actions: A suggested Revision of Rule 23. 46 Col. L.R. 818. But some lower federal courts have "accept(ed) without question the theories of Moore or Blume or Street, the modern pioneers in this wilderness." (33 Cornell L.Q. 327). For example, see *Oppenheimer* v. *F. J. Young & Co.*, 144 F. 2d 387, 390 (C.A. 2); *California Apparel Creators* v. *Wieder of*

California, 162 F. 2d 893 (C.A. 2) and *York* v. *Guaranty Trust Co.*, 143 F. 2d 503 (C.A. 2) which hold that a subdivision (3) class action will not be *res judicata* as to absent members unless they intervene *after trial* but *before judgment*.

If the opinion of the court below constitutes a holding that the cases at bar are subdivision (3) class actions, its holding is in accord with the above cited decisions of the Court of Appeals for the Second Circuit in requiring intervention at some stage of the litigation. But such holding is in conflict with *Weeks* v. *Barcco Oil Co.*, 125 F. 2d 84, 91 (C.A. 7) and with *National Hairdressers & C. Ass'n.* v. *Philad Co., Appellant*, 129 F. 2d 1020 (C.A. 3). The *Weeks* case held that absent members are bound by judgments entered in subdivision (3) class actions. The *National Hairdressers* case held that a judgment in a subdivision (3) class action in favor of 5,000 *absent* members was *res judicata* as to them. It did that by affirming *per curiam*, upon the opinion of the district court judge, the judgment in *National Hairdressers & C. Ass'n.* v. *Philad*, 41 F. Supp. 701.

Considering the class suit as no more than a permissive joinder device has led Moore and some courts to conclude that in such cases "there is no substantial question of representation." 3 Moore, Federal Practice 3424-3426, 3456. This flies in the face of the first paragraph of Rule 23 which expressly calls for adequate representation and it overlooks *Hansberry* v. *Lee*, *supra*, which shows that adequacy of representation is the very heart of the matter. Nevertheless, Moore criticizes those courts which have made "a more searching inquiry as to adequacy of representation"

for their failure to distinguish between the three types of class actions in the process.

We see then that Moore's rather doctrinaire and mechanistic approach has led thinking on the subject (including his own) away from the crucial question of adequacy of representation. See 8 Chicago L.R. 684, 707. The resolution of this question in each individual case is the only way in which due process can be accorded and justice can be done in the infinite variety of fact situations which may be presented in class actions, while at the same time maintaining the usefulness of the device of virtual representation to avoid multiplicity and to save time and expense.

Moore's theories lead logically and inexorably to the conclusion that the subdivision (3) action is not a class action at all, and thus to the destruction of the idea of virtual representation in cases where no specific property is involved. Why is this so?

> "The theory of the action, where one properly sues for all, is that the result is conclusive on all who are similarly situated and whom the plaintiff rightfully represents; and such must be the theory, or else the plaintiff does *not* represent all, and the statement that he does is not only false but absurd." *Linden Land Co.* v. *Milwaukee Electric Ry. & Light Co.*, 107 Wis. 493, 508, 83 N.W. 851, 856.

See also Rahl; The Class Action Device and Employee Suits under the Fair Labor Standards Act, 37 Ill. L.R. 119, 125, 126; 46 Columbia L.R. 818, 825.

If subdivision (3) is only a permissive joinder device, everything that it was supposed to accomplish can be done by way of intervention under Rule 24 or

joinder under Rule 20, if only provision is made for notice; and since the benefits of the litigation cannot be had without intervention, there is no diminution in the number of persons before the court, except to the extent that those who are denied notice and those whose claims are so small they cannot afford to intervene are prevented from appearing. The result, of course, is that such persons are denied any adjudication of their rights. The evil is compounded if the statutes of limitation are allowed to run after suit is filed, for if notice comes after the bar has fallen, those who *could* afford to intervene may lose their rights too.

Viewed in the context of the facts in the *National Hairdressers* case where there were 5,000 absent class members, or in the context of a class suit to establish voting rights for a larger group of disenfranchised citizens, the consequences of an uncritical adoption of Moore's theories are startling and unfortunate in the extreme. In *National Hairdressers* must each of 5,000 absent members of that association intervene in order to prevent the Philad Co. from bringing an action against each one of them for alleged infringement of Philad's invalid patent, when the class action brought on their behalf establishes the invalidity of the patent and enjoins such infringement suits? Where is the clerk of the court to store the files? Where is the courtroom that will hold the attorneys? In the voters situation if the judgment has no effect on absent members, not one of the disenfranchised voters will have had his right to vote established, unless he intervenes.

8. Summary; It appears that there is much doubt and confusion as to the scope of class suits under Rule

23(a) and that in many cases, of which the case at bar is a notable example, the lower federal courts have lost sight of the historic function of such suits and have been limiting the scope and usefulness of Rule 23. This being so, should not this Court take hold and give definition and substance to the procedures which it embodied in the Rule?

We suggest that this Court should make it clear that the adoption of Rule 23 has not limited the relief available in class suits; that the filing of such an action protects absent parties against limitations; that it is still up to the trial judge to decide whether the parties actually before the Court can and will fairly represent and protect the absent members; that if there be any doubts on this score, there should be provision for adequate notice, so that anyone in interest may be heard; and that once the interests involved are fairly before the Court, absent parties will be bound by any judgment entered to the extent that the facts established in court require that they be bound.

Unless subdivision (3) be regarded as more than a permissive joinder device it will be so cumbersome to use where there are thousands of individuals involved as to be useless. To deny the principle of adequate representation or to permit rights to be lost by denying notice is to deny due process. To require intervention *before* trial as a condition of protection against limitations is to impose a burden that most members of a large class would not assume, and the result would be that their rights would be gone before the issues were tried. Even to require intervention *after* trial would involve paperwork and expense which are needless, unless issues of fact pertaining to the absent members remain to be tried.

Grave doubts have been raised with regard to the nature of the "specific property" required for a class action under Rule 23(a)(2) F.R.C.P.

All usefulness has been denied to this type of class action (whether it be "hybrid" or "spurious") by treating it as having no real effect, and thus denying effective representation to such a class, by denying litigation costs and attorneys fees to those who might be willing to undertake representation of the class. It is bad enough that this has happened in this case; it is tragic indeed that the opinion below, if allowed to stand, will make it economically impossible in the future for large groups of persons, each with the same kind of small claim, to assert or protect their rights.

E. Litigation Costs and Attorneys' Fees

The District Court's allowance of attorneys' fees of 5% (amounting to about $10.00 per veteran) against the funds belonging to 8,440 veterans was based upon the stipulated fact that, of the 8,440 veterans, several thousand are similarly situated to the plaintiffs who brought these class actions (R. 83), upon the conclusion that, but for such class actions, the applicable statutes of limitation would have barred the claims of the several thousand (R. 153), and upon the finding from the trial evidence that, but for the services rendered in *Plesha*, *Hormel*, *Emmet*, *Deering* and *Mabbutt*, and before Congress, by the attorneys to whom the fees were awarded, none of the 8,440 veterans would have recovered the funds illegally or erroneously taken from them (R. 154).

In so acting, the District Court exercised its discretion under the broad equity powers of the federal

courts confirmed by this Court in *Sprague* v. *Ticonic Bank*, 307 U.S. 161, 167 and in *United States* v. *Equitable Trust Co.*, 283 U.S. 738, 744. That Court, which observed all of petitioners' attorneys both at the bar and as witnesses called by the Government, said:

> "There cannot be the slightest doubt but that the services of counsel in the *Plesha* case, in the pending actions, and in all of the various extensive work directly and indirectly incident thereto have and will produce the ultimate recovery to be had by the veterans to be benefited by the services. Likewise, there can be no reasonable doubt that these services were highly skilled, ingenious, persistent and effective." (R. 144).

The Court of Appeals has reversed the District Court's allowance of attorneys' fees. In so doing, the Court held that it was not within the equity powers of the federal courts, as those powers are defined in *Sprague* v. *Ticonic Bank*, *supra*, to make any allowance based *solely* upon the professional services rendered in the *Plesha* case. This was true, the Court said, because *Plesha* was not a class action and could not toll the applicable statutes of limitation for several thousand other veterans whose N.S.L.I. dividends had been misappropriated; therefore, their claims were subject to the defense of limitations, the waiver of which by Congress was a necessary precondition to their payment; and it was the Act of Congress (P.L. 85-586) not the decision in *Plesha* which made refunds available to these veterans. The effect of class actions on the claims of these similarly situated veterans is dismissed by saying that such actions saved from the statutes of limitation only those who have heretofore intervened or may be expected to intervene in view of the enact-

ment of P.L. 85-586, and by saying: "The saving of so few . . . is not an adequate reason for imposing attorneys fees on all 8,400 *litigants* (sic)."

However true the statements of the Court of Appeals may be in their fragmentary form, its line of reasoning simply begs the question. The *combined* effect of these several cases, namely *Plesha, Hormel; Deering, Mabbutt* and *Emmet*, was either ignored or overlooked by the Court. The Court of Appeals did *not* decide, as it was obligated to do by the facts proved, whether these combined efforts, plus the efforts of petitioners' attorneys before Congress, satisfied the requirements of *Sprague*. When all of the suits and expenditures and services are considered together, there is ample basis for the award of litigation costs and attorneys' fees made by the trial judge, to whom a large measure of discretion is given in cases such as this. *Sprague* v. *Ticonic Bank*, 307 U.S. at 167; *Doherty* v. *Bress*, 104 U.S. App. D.C. 308, 262 F. 2d 20, 22; *Walsh* v. *National Savings & Trust Co.*, 101 U.S. App. D.C. 195, 247 F. 2d 781, 782.

If the rights of the several thousand similarly situated veterans who are represented, but absent, in these class actions were and are *not* barred by limitations, the fact that it took the *combined* efforts in *Plesha, Hormel* and these class actions to establish their rights by *stare decisis* rather than by some more direct means would not preclude the allowance of fees. *Sprague* makes this very clear. 307 U.S. at 167. If *Sprague* does not make this clear, then, in the words of *Sprague*, there can be no "individualization in the exercise of a discretionary power [which] will alone retain equity and save it from sterility"!

As we have demonstrated above (Heading D), their legally enforceable rights have been preserved against the bar of limitations. The statutes of limitation were tolled as to all persons who were members of the class of similarly situated persons by the filing, in November 1950, of *Hormel*, a class suit. Although final judgment was entered in that suit, after a motion to notify all others similarly situated had been denied, and after the decision in *Plesha* (R. 152), the filing (before the entry of judgment in *Hormel*) of *Degring* and *Emmet* in December 1955 and *Mabbatt* in January 1956 continued the protection against limitations from the date they were filed. Furthermore, their claims were not subject to the technical defenses of "voluntary payment" or *res judicata;* they had not paid upon demand or as a result of judgments obtained against them. To the contrary, their money had been illegally seized by way of offsets.

We recognize that there is a difference between an allowance of litigation costs and fees against those within the class of similarly situated persons (e.g. those encompassed within the terms of the complaints filed herein), and an allowance of such costs and fees as against persons outside the class (e.g. those who had paid the Government on demand) who had no enforceable legal right which the suits could protect or advance, but who were benefited by the litigation. The Court of Appeals does not recognize this distinction, but treats the matter as if *none* of the persons involved had any legal rights worth considering. We will discuss the situation as to each group in turn.

The simliarly situated veterans covered by the class suits include those whose lives were insured under commercial policies protected from lapse under the Sol-

diers' and Sailors' Civil Relief Act and from whom the Veterans Administration had seized sums alleged to be due the United States as a result of the protection of such commercial insurance, by taking offsets against their N.S.L.I. dividends and/or by taking offsets against their disability compensation. Emmet himself belonged to both classes (R. 9). All members of these two classes were protected by these class actions against the running of the six year statutes of limitation which would have otherwise barred their claims before *Plesha* was decided. Therefore, and solely as a result of this litigation, when Congress was considering P.L. 85-586 these people were not in the position of supplicants for discharge of a moral obligation; they had legal rights which Congress could not disregard. That Congress was well aware of this is demonstrated by the legislative history of P.L. 85-586 set forth in the Statement of Facts, *supra*, pp. 13-15, particularly the statement in House Report No. 1491, 85th Congress, that P.L. 85-586 provided for "expeditious administrative payment" of "a windfall for the 8440 potential claimants", and that "any delay can only mean further litigation . . . and since the principle already has been decided by the Supreme Court, no matter how long the delay the ultimate result would be payment . . .".

In the judgments entered herein in November 1958, the rights of all suffering offsets against N.S.L.I. dividends and disability compensation were provided for—they participated in the fruits of the litigation. These judgments gave broader relief than P.L. 85-586. There were no time limits or other restrictions on payments;[6] *and* for all those suffering offsets against N.S.L.I. dividends, *interest* was provided.

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[6] This is significant; see footnote 3, page 16.

As to the members of the class, then, there can be no real doubt that as far as causal connection is concerned these people owed their monies to the pressures exerted by all these cases and to the expenditures of money and time required to prosecute them, and that P.L. 85-586 was the result of these efforts, not an independent, efficient, intervening cause of payment. The District Court so found (Finding No. 23, R. 154). Proximate and intervening cause are issues properly made the subject of findings of fact and are subject to Rule 52(a) F.R.C.P. *Milwaukee & S.P.R. Co.* v. *Kellogg*, 94 U.S. 469; *Deputy* v. *DuPont*, 308 U.S. 488, 497; 38 Am. Jur. 1056-1061; 53 Am. Jur. 201-203; 3 Am. Jur. 464-471. The fact that "the class Congress favored is broader than that covered by the *Plesha* decision", as the Court of Appeals said, and broader than the class protected by these class actions does not disprove that, "Congress was moved by this litigation to pass an Act assisting these claimants". Certainly, standing alone, and in face of the history of this litigation and the legislative history of P.L. 85-586, that fact would not make the District Court's Finding of Fact No. 23, "clearly erroneous" within the meaning of F.R.C.P. 52(a).

If that Finding is not "clearly erroneous", did the District Court validly exercise the equity powers of the federal courts in basing the allowance of fees thereon? In reliance on the *Sprague* case, *Lafferty* v. *Humphrey*, 101 U.S. App. D.C. 222, 248 F. 2d 82, held that, when services rendered in a class action move executive officers of the Government to seek and obtain legislation which provides the relief sought in the class action, the non-intervening members of the class have been substantially benefited by the law suit conducted

on their behalf, and that is adequate reason to impose attorneys' fees upon them.

The Court of Appeals held that intervention in these class actions is necessary in order to save the represented, but absent, class members from the bar of limitations; that only a few of them have intervened. "Few more, if any, are likely to join in view of Public Law 85-586; and "The saving of so few * * * is not an adequate reason for imposing attorneys' fees upon all * * * ". This holding constitutes an unwarranted curtailment of the equity powers of the federal courts and is based upon two fallacious premises.

The holding is first based upon the premise that several thousand class members who did not intervene knew of their right to do so. But, as noted above, the record establishes that the absent members did not have notice of their right to intervene, the petitioners' request that such notice be given having been twice denied by the courts.

The second premise upon which the holding is based is that, if the absent members had been given notice they would not have exercised their right to intervene. Public Law 85-586 was not enacted until August 1, 1958. If, as petitioners proposed, the absent members had been given notice in August 1957, of their right to intervene (and that it was necessary to do in order to save their legal rights against the bar of limitations) how many would have failed to intervene? To use the words of the Court of Appeals: Few, if any! This is best illustrated by the fact that between August 1 and October 15, 1958, the latter date being five days before these cases were reached for trial in the District Court, 3,058 of 8,440 veterans had applied for and received $648,414.76 of the total refunds of $1,643,065.78 au-

thorized by P.L. 85-586 (R. 151). But, how many of the 8,440 would have applied *at any time* for the refunds, if the Veterans Administration had not, pursuant to Congressional directive, issued upon the insistence of petitioners' attorneys (R. 115, 116), notified each veteran that the Public Law authorized the refunds and that it was necessary to make application therefor by August 1, 1960 in order to be saved from the statute of limitation set forth in the Public Law? Again the answer must be: Few, if any!

The allowance of fees in *Sprague* was based on the creation of a fund. Whether or not a "distinct", identifiable, specific Fund is necessary, such Funds were and are present here. We have discussed at length (with regard to "hybrid" class suits) the several funds which were involved: The N.S.L.I. (Trust) Fund, the Soldiers' and Sailors' Civil Relief Revolving Fund, the appropriations made by P.L. 85-586, and by other Acts of Congress "earmarking" funds for the payment of disability compensation. The N.S.L.I. Fund has never been less than the $962,048.83 removed therefrom, and the lowest balance in the Revolving Fund into which all collections have been traced was $446,000.00 (R. 84, 130); sufficient to repay the remaining offsets, amounting to $88,469.43 or less (R. 114). The appropriation made by P.L. 85-586 was compelled, at least as to the members of the class, by this litigation and the appropriation went into the identifiable Revolving Fund restoring thereto that which had been improperly placed therein and removed therefrom for the use of the United States.

The final proof that a fund exists here is the fact that 10% of the total $1,643,065.78 is now being held

pursuant to the injunction, issued by the District Court on August 15, 1958 (R. 89, 111).

We turn now to the persons who had no legally enforceable rights and who would have received nothing if Congress had not acted. The existence of a specific Fund, namely the P.L. 85-586 appropriation, has already been shown. This appropriation is earmarked for the payment of these persons. This leaves us with the question of whether this Fund was "created" by this litigation in such manner as to make it proper to require non-members of the class to bear their share of the expenses of the litigation.

That the litigation (even the *Plesha* case alone) was "a necessary precondition to the payment of any refunds to the veteran claimants" is conceded in the opinion of the Court of Appeals. Those without legally enforceable rights would have received nothing if Congress had not acted and Congress would not have acted at all if it had not been for the decision in *Plesha*.

That the compulsion exerted by *Plesha* and by these class actions extended to those not entitled to rely on those cases as a matter of law is shown by Senate Report No. 1862, 85th Congress, 2nd Sess. which stated that the waiver of technical defenses was included to assure "equal treatment of all those concerned in this matter". The report further stated that "the purpose of the bill is to satisfy outstanding obligations of the Government heretofore established by the decision of the Supreme Court in the Plesha case".

It was likewise to assure "equal treatment of all those concerned in this matter" that the District Court as a matter of equity awarded attorney's fees against the entire amount to be paid out of the Soldiers' and

Sailors' Civil Relief Act Revolving Fund. It was that Court's view that it would be less than equitable not to spread the costs among all who received the benefits of this entire litigation, whether as a matter of right or as a matter of grace.

Do the equity powers of the federal courts, as re-established in *Sprague*, support the District Court's allowance of attorney's fees against that part of the Fund which "for all practical purposes" was created by this litigation for those of the 8,440 veterans who had no legally enforceable right to recover the monies erroneously taken from them? Or may such an allowance be made only against a Fund that is created by formal decree or through *stare decisis*? In reliance upon the *Sprague* case, *Walsh* v. *National Savings and Trust Co.*, *supra*, held:

> "An attorney who creates, increases, preserves or protects a trust fund, with an accompanying benefit to all who are entitled to participate in the trust, is entitled to receive his fee from the corpus of the trust. On the other hand it is also true that a litigious party or one who seeks a construction in bad faith is not entitled to costs out of the corpus. *Between these extremes lies the large body of cases which call into play the chancellor's discretion as to whether or not some or all of the costs of litigation should be charged to the corpus of the trust. The case at bar is in this area.*"

We believe that the equity powers of the federal courts as enunciated in *Sprague* are as broad as *Walsh* stated them to be. If they are not, then the "individualization in the exercise of a discretionary power [which] will alone save equity as a living system and save it from sterility" is proscribed.

In conclusion, we submit that in reversing the allowance of attorneys' fees against *all* 8,440 veterans, including those who had no legal right which could be protected by these class actions, the Court of Appeals came in conflict with *United States* v. *Equitable Trust Co., supra.* If the Court of Appeals' definition of the equity powers is correct, then equity rewards the indolent or uninformed, whose rights would have perished but for the services rendered on their behalf; and equity punishes those who rendered the services—Plesha, Hormel, Emmet, Mabbutt, Deering and their attorneys—by imposing upon them over $2,900 in litigation expenses (R. 154), plus the penalties to be exacted under the $3,000 bond, which was required by the District Court as a condition to the issuance of the preliminary injunction forbidding the disbursement of more than 90% of the payments authorized by P.L. 85-586. If the Court of Appeals is correct, then the rule of practice which makes it economically feasible for members of the bar to challenge the arbitrary actions of Government officials, when such actions involve the illegal taking of a relatively small amount of property from one citizen, but in the aggregate, the taking of a tremendous amount of property from many citizens, is no longer in existence. In the *Equitable Trust Co.* case this Court held that such a rule is "absolutely essential to the safety and security of a large number of persons who are entitled to the protection of the law—indeed, stand most in need of it—but who are incompetent to know when they are wronged, or to ask for protection or redress".

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari, should reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit and should reinstate the judgments of the United States District Court for the District of Columbia.

Respectfully submitted,

JOHN GEYER TAUSIG
NATHANIEL F. BEDFORD
LAWRENCE A. SCHEI

Of Counsel:

BUTLER, KOEHLER & TAUSIG
1039 Investment Building
Washington 5, D. C.

JILLSON, BEDFORD & HOPPEN
68 William Street
New York 5, New York

WHITE, HARBER, FORT & SCHEI
923 Twelfth Street
Sacramento 14, California